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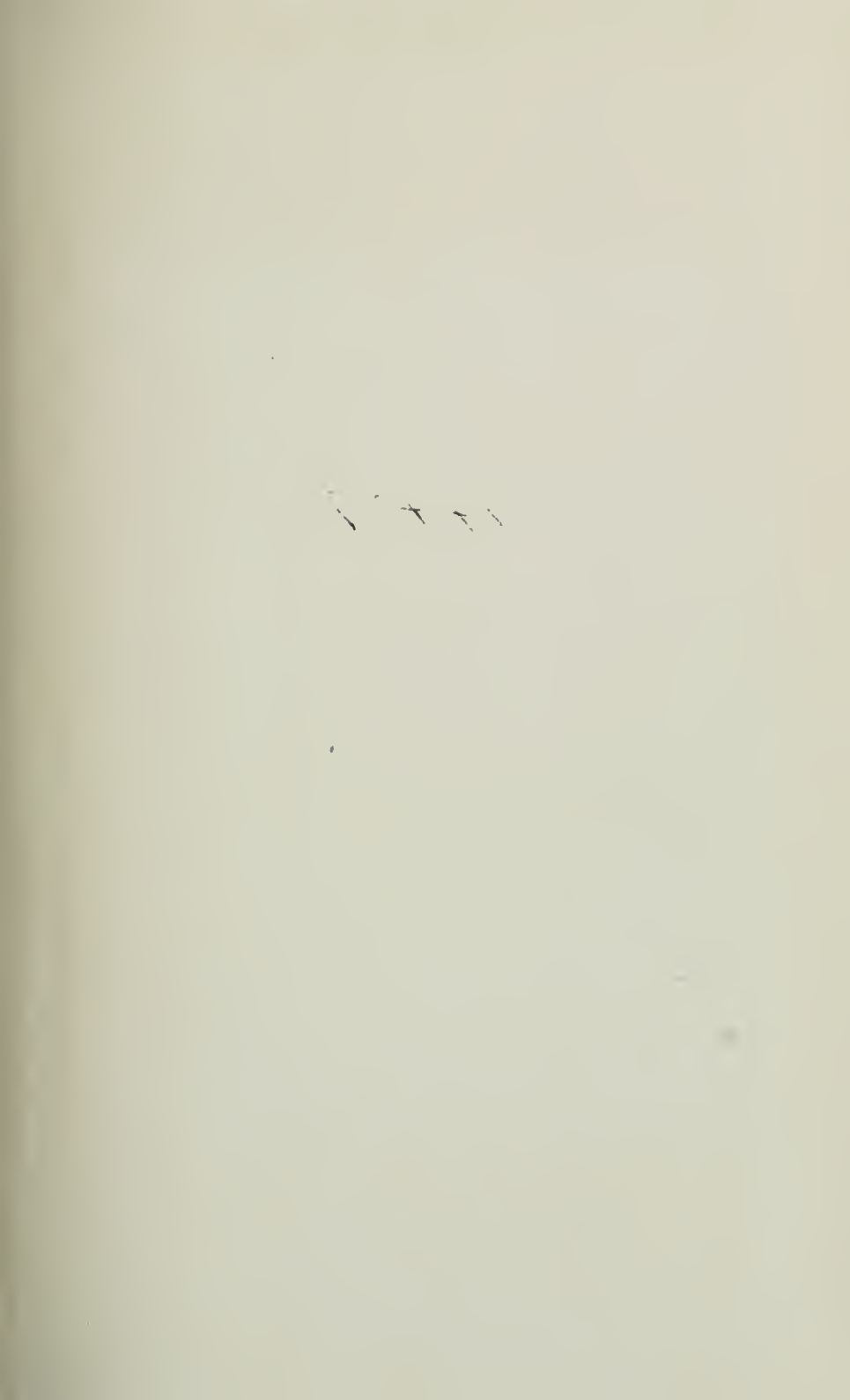
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2579
No. 12230

United States
Court of Appeals
for the Ninth Circuit

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC., a Corporation,

Appellant,

VS.

C. A. McCANDLESS,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska,
Third Division

FILED

JUN 13 1949

PAUL P. O'BRIEN,

CLERK

No. 12230

United States
Court of Appeals
for the Ninth Circuit

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AIRLINES, INC., a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Anchorage, Alaska,

WENDELL P. KAY,
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Attorneys for C. A. McCandless, plaintiff.

JOHN E. MANDERS,
Anchorage, Alaska,

EDWARD V. DAVIS,
Anchorage, Alaska,

Attorneys for Don Dorothy and Pacific
Northern Airlines, Inc., a Corporation,
Defendants, respectively. [1*]

* Page numbering appearing at foot of page of original
certified Transcript of Record.

In the District Court for the Territory of Alaska,
Third Division

No. A-4725

C. A. McCANDLESS,

Plaintiff,

vs.

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC., a Corporation,
Defendants.

COMPLAINT

Comes now the plaintiff in the above-entitled action, and for cause of action against the above-named defendants, alleges:

I.

That the plaintiff was at all times mentioned herein the owner of a Stinson Aircraft, designated as NC18411, said Aircraft being of a Stinson SR-9 type, equipped with a 450 horsepower Pratt and Whitney engine.

II.

That at all times herein mentioned Don Dorothy, co-defendant above-named, was an employee and agent of the Pacific Northern Airlines, Inc., a corporation.

III.

That the defendant, Pacific Northern Airlines, Inc., is a corporation.

IV.

That on or about the 4th day of September, 1947, the defendant, Don Dorothy, representing to the

plaintiff that the said Don Dorothy was the representative of and acting on behalf of the co-defendant, Pacific Northern Airlines, Inc., did negotiate with the plaintiff for the purchase of said Aircraft; that thereupon the plaintiff and the defendant, who then and there represented that he was acting for the co-defendant, Pacific Northern Airlines, Inc., entered into a verbal agreement, by which the plaintiff, at the instance and request, agreed with the said Don Dorothy that [2] said Aircraft could be taken by the said Don Dorothy to the hangar owned by the said Pacific Northern Airlines and located at Merrill Field, Anchorage, Alaska, for the purpose of having said Aircraft examined and inspected by employees of the defendant corporation.

V.

That thereafter the said Don Dorothy, acting for and on behalf of said defendant corporation, wrongfully and unlawfully took possession of said Aircraft and converted the same to the use and benefit of the defendant corporation; that the said defendant, Don Dorothy, in violation of the verbal agreement *agreement* between the plaintiff and the defendants, wrongfully and unlawfully flew said Aircraft on the 6th day of September, 1947, from Anchorage, Alaska, to Kasilof and Kenai, Alaska; that while the defendant, Don Dorothy, had said Aircraft at said towns the said Don Dorothy did at times unknown to the plaintiff convert said Aircraft to the use and benefit of the defendant corporation by engaging in the hauling of mail, freight, and passengers between said towns.

VI.

That while the defendant, Don Dorothy, was engaged in the use and operation of said Aircraft as aforesaid, said Aircraft was landed by the said Don Dorothy upon a beach of Cook Inlet near the town of Kenai; that said Aircraft was then wrecked by the said Don Dorothy; that said Aircraft as a result of said wreck was totally destroyed.

VII.

That on the 6th day of September, 1947, the date on which the said Don Dorothy unlawfully and wrongfully took possession thereof and converted the same to the use of the defendant corporation, the reasonable value of said plane was in the sum of \$8,500.00. [3]

VIII.

That the plaintiff has made demands upon the defendants for the sum of \$8,500.00; that the defendants have neglected, failed and refused to pay to the plaintiff said sum or any portion thereof and the whole thereof is now due and owing from the defendants to the plaintiff; wherefore the plaintiff prays judgment against the defendants, as follows:

1. That the Court award to the plaintiff the sum of \$8,500.00 as reimbursement to the plaintiff for the reasonable value of said plane and in compensation for the loss suffered by the plaintiff because of the wrongful and unlawful conversion of said Aircraft by the defendants to the use of said defendants.

2. That the plaintiff be awarded attorneys' fees of \$1,500.00.

3. That the plaintiff recover of the defendants the plaintiff's costs and disbursements herein occurred and expended.

/s/ C. A. McCANDLESS,
Plaintiff.

United States of America,
Territory of Alaska—ss.

C. A. McCandless, being first duly sworn on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true he verily believes.

/s/ C. A. McCANDLESS.

Subscribed and Sworn to before me this 1st day of October, 1947.

(Seal) /s/ EDWARD L. ARNELL,
Notary Public in and for Alaska.

My commission expires 6-21-51.

[Endorsed]: Filed Oct. 6, 1947. [4]

[Title of District Court and Cause.]

DEMURRER

Comes now Don Dorothy, one of the above-named defendants, and for himself but not for his co-defendant, demurs to plaintiff's Complaint filed in this action for the reason that such Complaint does not

state facts sufficient to constitute a cause of action.

Dated at Anchorage, Alaska, this 6th day of November, 1947.

/s/ EDWARD V. DAVIS,

Attorney for the Defendant, Don Dorothy.

Received: /s/ D. H. Cuddy, 7 Nov., 1947.

[Endorsed]: Filed Nov. 7, 1947. [5]

[Title of District Court and Cause.]

DEMURRER OF DEFENDANT PACIFIC
NORTHERN AIRLINES, INC.

Comes now Pacific Northern Airlines, Inc., one of the defendants in the above-entitled action, and demurs to the complaint of plaintiff on file herein and for grounds of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint does not state facts sufficient to constitute a cause of action against Pacific Northern Airlines, Inc., a corporation.

Wherefore, defendant prays that plaintiff take nothing by his [6] complaint and defendant be hence dismissed together with its costs of suit incurred herein.

/s/ JOHN E. MANDERS,

Attorney for Defendant, Pacific Northern Airlines,
Inc.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 6, 1947. [7]

M.O. OVERRULING DEMURRER

Now at this time the plaintiff not being present in court but represented by Edward L. Arnell, of his counsel, the defendants not being present, but represented by John E. Manders and Edward V. Davis, of their counsel. Whereupon the following proceedings were had, to-wit:

Argument to the Court was had by John E. Manders, for and in behalf of the defendants.

Argument to the Court was had by Edward L. Arnell for and in behalf of the plaintiff.

Argument to the Court was had by John E. Manders, for and in behalf of the defendants.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, overruled demurrer in cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., defendants, and defendants given 10 days within which to answer.

Entered Court Journal No. G-15, Page No. 278, Nov. 21, 1947. [8]

[Title of District Court and Cause.]

ANSWER

Comes now Don Dorothy one of the above-named defendants, and for himself and not for his co-defendant, by way of answer to plaintiff's Complaint, admits, denies and alleges as follows:

I.

Admits the allegations of the first, second and third paragraphs of plaintiff's Complaint.

II.

Defendant, Don Dorothy admits the allegations of the fourth paragraph of the plaintiff's Complaint insofar as they go, but alleges that the defendant, Don Dorothy for and on behalf of the defendant, Pacific Northern Airlines, at the same time, had an additional agreement with the plaintiff, C. A. McCandless concerning the rental of the above-described aircraft by the defendant corporation all as will more fully appear from the defendant's affirmative defense hereinafter set out.

III.

Defendant denies each and all of the allegations of the fifth paragraph of the plaintiff's Complaint, save and except that defendant admits that as an agent of defendant corporation, defendant, Don Dorothy, flew the aircraft described in plaintiff's Complaint to Kenai, Alaska, and did haul certain freight and passengers for the defendant corporation with such aircraft, and in that connection, defendant, Don Dorothy alleges that he took possession of such aircraft under a rental or charter agreement entered into between defendant, Don Dorothy, acting for and in behalf of Pacific Northern Airlines, and plaintiff, C. A. McCandless.

IV.

Defendant denies each and all the allegations of the sixth paragraph of plaintiff's Complaint, save and except the allegation that the defendant, Don Dorothy landed the aircraft therein mentioned upon the beach of Cook Inlet, the defendant, Don Dorothy, alleges that the aircraft was landed safely on the

beach at Kenai, Alaska, but that due to a mechanical failure of the brakes of the aircraft, the exact cause of which is unknown to the defendant, Don Dorothy, the aircraft swerved from the beach into the mud at the edge of Cook Inlet, and that the aircraft was thereupon damaged by the incoming tide. [9]

V.

Defendant denies each and all the allegations of the seventh paragraph of plaintiff's Complaint and alleges that the aircraft at the time the defendant took possession of the same, was of a value not exceeding six thousand dollars.

VI.

Defendant admits that he has refused to pay the plaintiff the sum of eight thousand five hundred dollars (\$8,500.00) and denies each and all the other allegations of the eighth paragraph of plaintiff's complaint.

VII.

As a further answer to plaintiff's Complaint and by way of affirmative defense thereto, Defendant, Don Dorothy alleges as follows:

1. That on or about the fourth day of September, 1947, the defendant, Don Dorothy, for and on behalf of the defendant, Pacific Northern Airlines, arranged a charter agreement with the plaintiff concerning the aircraft described in the first paragraph of plaintiff's Complaint. That by the terms of such agreement the defendant airline was to be entitled to use the said aircraft at such times as might be required by the defendant airline in hauling passengers, freight and mail between Anchorage, Alaska, and Homer,

Alaska, and intermediate points at a charter rate of thirty-five dollars (\$35.00) per hour. That at the same time defendant Dorothy had some discussion with the plaintiff about possible purchase of the aircraft to the defendant airline for the sum of eight thousand five hundred dollars (\$8,500.00). That the offer was not accepted and the sale was not consummated and that it was agreed that if the defendant airline was interested in purchasing the aircraft it should be entitled to have the aircraft inspected by its own mechanics and thereupon further negotiations would be had concerning the possible sale of the aircraft.

2. That on or about the sixth day of September, 1947, the defendant, Dorothy, for and on behalf of Pacific Northern Airlines, took possession of the aircraft described in plaintiff's Complaint, under the rental or charter agreement above mentioned and flew the aircraft to Kenai, Alaska, and landed the aircraft on the beach at such place.

3. That during the landing roll of the aircraft the right wheel of the aircraft became locked, causing the aircraft to veer sharply to the right and into the mud below the beach and that thereafter before the aircraft could be removed from the mud, the incoming tide, partially covered the aircraft and caused certain damage to the aircraft.

4. That the beach at the place selected by defendant, Dorothy, for the landing was hard and was in a safe condition for making a landing and that in fact the landing was made safely and no damage would have resulted except for the mechanical failure of the brake as above-described. That the brake

locked from some mechanical failure of the aircraft, the cause of which is unknown to defendant, and that the defendant, Don Dorothy, was not negligent in any manner in making the landing at the time and in the place in question and that the defendant, Don Dorothy, is not responsible in any way for the fact that the airplane left its course and became mired in the mud. That the defendant, Don Dorothy, used all reasonable precautions in flying and in landing the aircraft and that the damage done to the aircraft by the incoming tide was caused by [10] forces beyond the control of the defendant, Don Dorothy, and without any negligence or carelessness on his part.

5. That thereupon as soon as the same could be done, the aircraft was removed from the mud and was returned to Anchorage, Alaska, and to the possession of the plaintiff.

6. That defendant, Don Dorothy, is not responsible in any manner for the damage which occurred to the plaintiff's aircraft.

Wherefore, defendant, Don Dorothy, prays that the plaintiff may take nothing of the defendant, Dorothy, by reason of plaintiff's Complaint, and that the defendant, Dorothy, may have of and from the plaintiff, defendant's costs in this action incurred, including a reasonable attorney's fee to be set by the Court.

/s/ EDWARD V. DAVIS,

Attorney for the Defendant, Don Dorothy.

(Duly Verified.)

[Endorsed]: Filed Dec. 1, 1947. [11]

[Title of District Court and Cause.]

ANSWER

Comes now Pacific Northern Airlines, Inc., one of the defendants above-named, and for itself and not for its co-defendant, in answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations in Paragraphs I, II and III of plaintiff's complaint.

II.

Defendant Pacific Northern Airlines, Inc., admits the allegations of the fourth paragraph of the plaintiff's complaint insofar as they go, but alleges that the defendant, Don Dorothy, for and on behalf of the defendant Pacific Northern Airlines, Inc., at the same time had an additional agreement with the plaintiff, C. A. MacCandless concerning the rental of the above-described aircraft by the defendant corporation all as will more fully appear from this defendant's affirmative defense hereinafter set out.

III.

Defendant denies each and all of the allegations of the fifth paragraph of the plaintiff's complaint, save and except that defendant admits that as an agent of defendant corporation, defendant Don Dorothy flew the aircraft described in plaintiff's complaint to [12] Kenai, Alaska, and did haul certain freight and passengers for the defendant corporation with such aircraft, and in that connection defendant alleges that possession of such aircraft was taken under a rental or charter agreement entered into between

defendant, Don Dorothy, acting for and in behalf of Pacific Northern Airlines, Inc., and plaintiff C. A. McCandless.

IV.

Defendant denies each and all the allegations of the sixth paragraph of plaintiff's complaint, save and except the allegation that the defendant Don Dorothy landed the aircraft therein mentioned upon the beach of Cook Inlet, and defendant Pacific Northern Airlines, Inc., alleges that said aircraft was landed safely on the beach at Kenai, Alaska, but that due to a mechanical failure of the brakes of the aircraft, the exact cause of which is unknown to this defendant, the aircraft swerved from the beach into the mud at the edge of Cook Inlet, and that the aircraft was thereupon damaged by the incoming tide.

V.

Defendant denies each and all the allegations of the seventh paragraph of plaintiff's complaint and alleges that the aircraft at the time the defendant took possession of the same, was of a value not exceeding thirty-five hundred dollars (\$3,500.00).

VI.

Defendant admits that it has refused to pay the plaintiff the sum of eight thousand five hundred dollars (\$8,500.00), and denies each and all the other allegations of the eighth paragraph of plaintiff's complaint.

VII.

As a further answer to plaintiff's complaint, and

by way of affirmative defense thereto, this defendant alleges as follows:

1. That on or about the fourth day of September, 1947, the defendant, Don Dorothy, for and on behalf of the defendant Pacific Northern Airlines, Inc., arranged a charter agreement with [13] the plaintiff concerning the aircraft described in the first paragraph of plaintiff's complaint. That by the terms of such agreement the defendant airline was to be entitled to the possession and the use of said aircraft at such times as might be required by the defendant airline in hauling passengers, freight and mail between Anchorage, Alaska, and Homer, Alaska, and intermediate points, at a charter rate of thirty-five dollars (\$35.00) per hour. That at the same time defendant Dorothy had some discussion with the plaintiff about a possible purchase of the aircraft by this defendant for the sum of eight thousand five hundred dollars (\$8,500.00). That the offer was not accepted and the sale was not consummated, and that it was agreed that if this defendant was interested in purchasing the aircraft it should be entitled to have the aircraft inspected by its own mechanics and thereupon further negotiations would be had concerning the possible sale of the aircraft.

2. That on or about the sixth day of September, 1947, the defendant, Don Dorothy, for and on behalf of Pacific Northern Airlines, Inc., took possession of the aircraft described in plaintiff's complaint under the rental or charter agreement above-mentioned and flew the aircraft to Kenai, Alaska, and landed the aircraft on the beach at such place.

3. That during the landing roll of the aircraft the right wheel of the aircraft became locked, causing the aircraft to veer sharply to the right and into the mud below the beach and that thereafter before the aircraft could be removed from the mud, the incoming tide partially covered the aircraft and caused certain damage to the aircraft.

4. That the beach at the place selected by defendant, Don Dorothy, for the landing was hard and was in a safe condition for making a landing, and that in fact the landing was made safely and no damage would have resulted except for the mechanical failure of the aircraft, the cause of which is unknown to defendant, and that this defendant and defendant Don Dorothy were not negligent in any [14] manner in making the landing at the time and in the place in question, and that this defendant and defendant Don Dorothy are not responsible in any way for the fact that the airplane left its course and became mired in the mud. That all reasonable precautions were used in flying and in landing the aircraft, and that the damage done to the aircraft by the incoming tide was caused by forces beyond the control of this defendant and defendant Don Dorothy, and without any negligence or carelessness on its or his part.

5. That thereupon, as soon as the same could be done, the aircraft was removed from the mud and was returned to Anchorage, Alaska, and to the possession of the plaintiff.

6. That this defendant is not responsible in any manner for the damage which occurred to the plaintiff's aircraft.

Whereupon, this defendant prays that plaintiff take nothing by his action, and that this defendant be hence dismissed with its costs of suit herein incurred.

JOHN E. MANDERS,

Attorney for Defendant, Pacific Northern Airlines,
Inc. [15]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 2, 1947. [16]

[Title of District Court and Cause.]

REPLY

Comes now, C. A. McCandless, plaintiff, and replies to the affirmative defense stated in Paragraph VII of the Answer heretofore filed by Don Dorothy, one of the above-named defendants, and alleges as follows:

1. Plaintiff denies each and every allegation contained in the first ten (10) lines of Subparagraph (1) of Paragraph VII of said Answer, relative to the existence of a charter agreement; plaintiff admits the allegations contained in the remainder of the said Subparagraph (1).

2. Plaintiff admits the taking of the aircraft by the said defendant on or about the 6th day of September, 1947; plaintiff denies the existence of a rental or charter agreement, as alleged in Subparagraph (2) of Paragraph VII of the said Answer.

3. Plaintiff denies the allegations of Subparagraphs (3), (4), (5), and (6), of Paragraph VII, of said Answer.

Wherefore, plaintiff prays that he may have judgment against the defendant as asked in the complaint.

/s/ WENDELL P. KAY,
Attorney of Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Jan. 26, 1948. [17]

[Title of District Court and Cause.]

REPLY

Comes now, C. A. McCandless, plaintiff and in reply to the affirmative defense stated in Paragraph VII of the Answer filed herein by Pacific Northern Airlines, Inc., one of the defendants above-named, alleges as follows:

1. Plaintiff denies the allegations contained in Subparagraph (1) of Paragraph VII of said Answer, except that plaintiff admits that some discussion was had with the defendant, Don Dorothy, concerning the purchase of the aircraft for the sum of \$8,500.00, which sale was not consummated.

2. Plaintiff admits that Don Dorothy took possession of the aircraft on or about the 6th day of September, 1947, but denies that such taking was under any rental or charter agreement as alleged in Subparagraph (2) of Paragraph VII of said Answer.

3. Plaintiff denies the allegations of Subparagraphs (3), (4), (5), and (6), of Paragraph VII of said Answer.

Wherefore, plaintiff prays for judgment against the defendant as asked in the Complaint.

/s/ WENDELL P. KAY,
Attorney for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Jan. 26, 1948. [18]

TRIAL BY JURY CONTINUED

Now came the Trial Jury who, on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, was resumed.

William V. Smith, being first duly sworn, testified for and in behalf of the defendants.

The defendant rests.

At this time the Trial Jury was excused upon motion of John E. Manders, of counsel for defendants, pending arguments on point of law.

At this time John E. Manders of counsel for defendants, renews motions for non-suit and directed verdict on same grounds as heretofore; Edward V. Davis, of counsel for defendants, concurring therein; motions denied.

At this time Wendell P. Kay, of counsel for

plaintiff, moves the Court for leave to amend pleadings to conform to proof in respect to word "Kasilof" in Paragraph 6, and the Clerk was instructed to strike the word "Kasilof" and substitute word "Kenai," counsel for defendants not objecting thereto.

Trial Jury recalled.

At this time the Court read his instructions to the Trial Jury.

At 3:32 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:52 o'clock p.m.

Entered Court Journal No. G 16, Page No. 116.
Feb. 25, 1948. [19]

TRIAL BY JURY CONTINUED

Now came the Trial Jury who, on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-48725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, was resumed.

At this time John E. Manders, of counsel for defendants, moves the Court that the Jury be excused pending arguments on points of law; Jury excused.

At this time John E. Manders, of counsel for defendants, moves the Court for non-suit on grounds that plaintiff has failed to prove his case as laid; and for a directed verdict on grounds that plaintiff has failed to sustain the allegations of his com-

plaint as to relief demanded and has failed to show conversion of property as claimed in Complaint.

Edward V. Davis, of counsel for defendants, concurs in motions in behalf of defendant Don Dorothy.

Motion denied, and the Trial Jury recalled.

Don Dorothy, being first duly sworn, testified for and in his own behalf.

At 10:35 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 10:45 o'clock a.m.

Entered Court Journal No. G 16, Page No. 113, Feb. 25, 1948. [20]

HEARING ON ORAL MOTION RE JUDGMENT NOTWITHSTANDING VERDICT

Now at this time hearing on oral motion re judgment notwithstanding verdict in cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, came on regularly before the Court, the plaintiff not being present but represented by Wendell P. Kay, of his counsel, the defendant, not being present but represented by John E. Manders. The following proceedings were had, to wit:

Argument to the Court was had by John E. Manders, for and in behalf of both defendants, Don Dorothy and Pacific Northern Airlines, Inc., a corporation.

No argument by plaintiff.

Whereupon the Court having heard the argu-

ment of respective counsel and being fully and duly advised in the premises, overruled motion.

Entered Court Journal No. G 16, Page No. 132,
Mar. 2, 1948. [21]

In the District Court for the Territory of Alaska,
Third Division

No. A-4725

C. A. McCANDLESS,

Plaintiff,

vs.

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC., a Corporation,

Defendants.

JUDGMENT

This Matter having come on for trial on the 24th day of February, 1948, the parties appearing by their attorneys W. N. Cuddy and Wendell P. Kay, counsel for Plaintiff, and Edward V. Davis, counsel for defendant, Don Dorothy, and John E. Manders, counsel for the defendant Pacific Northern Airlines, Inc., a Corporation, and the Jury of twelve (12) persons having been regularly impaneled and sworn according to law to try said action, and witnesses for and on behalf of the plaintiff and defendants having been sworn and examined, and the jury having heard the evidence, arguments of counsel and instructions of the Court, having retired to consider their verdict, and the Jury having subsequently returned with a sealed verdict into Court

at 10 o'clock a.m., on the 26th day of February, 1948, and W. F. Cooper, Foreman of said Jury, having delivered to the Court said verdict, and the roll of the Jury then having been called, and ten (10) members thereof being present, Walter F. Brown and Mrs. Mike O'Neill, having been excused because of illness and upon stipulation of counsel, the Court thereupon having ordered said sealed verdict opened and read in the presence of the Jurors, said Verdict so read being as follows:

“Verdict No. 1. We, the Jury, duly selected, impaneled and sworn to try the above-entitled cause, do find for the plaintiff and against the defendants, and do find that the plaintiff is entitled to recover of and from the said defendants, and each of them the sum of \$7,500.00.

Dated at Anchorage, Alaska, this 25th day of February, 1948.

/s/ W. F. COOPER,
Foreman.” [22]

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is

Ordered, Adjudged and Decreed that the plaintiff have and recover from the Defendant, Don Dorothy, and Pacific Northern Airlines, a Corporation, and each of them, the sum of \$7,500.00, together with interest thereon at the rate of six per cent (6%) per annum from the date hereof until paid, and it is

Further Ordered, Adjudged and Decreed that the plaintiff have and recover from said Defend-

ants the sum of \$800.00 for plaintiff's costs and disbursements incurred in this action, and it is

Ordered, Adjudged and Decreed that the plaintiff have and recover from the said defendants the sum of \$800.00 as and for his attorney's fees incurred in this action.

Made and Entered this 26th day of March, 1948.

/s/ ANTHONY J. DIMOND,
District Court Judge.

Entered Court Journal G 16, Page No. 222, Mar. 26, 1948.

(Acknowledgment of Service.)

[Endorsed]: Filed March 26, 1948. [23]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Come now the defendants above named and move this honorable court for an order setting aside and vacating the verdict and judgment of the jury heretofore rendered and entered in favor of the plaintiff and against the defendants in the above-entitled action, and feeling aggrieved by such verdict and judgment move that a new trial of said action be granted to said defendants for the following causes alleged by defendants as materially effecting their substantial rights and the rulings of the court which were prejudicial to their substantial rights, to wit:

Errors in law occurring at the trial and excepted to by the defendants:

1. The court erred in overruling the respective

demurrers of defendants to the complaint of plaintiff on file herein.

2. The court erred in denying defendants' motion at the close of plaintiff's case to grant a non-suit on the ground that plaintiff had failed to prove a case as laid in his complaint.

3. The court erred in denying defendants' motion at the close of plaintiff's case to grant a directed verdict on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded, and that plaintiff had failed to show any conversion of the property, the subject matter of his complaint. [24]

4. The court erred in again denying defendant's motion for a non-suit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint.

5. The court erred in again denying defendants' motion for a directed verdict at the close of the case on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of said complaint.

6. The court erred in denying defendants' motion for a judgment notwithstanding the verdict on the ground that plaintiff had failed to prove a case as laid in his complaint and further that plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein and that plaintiff had not shown any conversion of the property, the subject matter of plaintiff's complaint.

Wherefore, defendants move said court to grant a new trial in the above-entitled action.

Dated this 3rd day of March, 1948.

/s/ EDWARD V. DAVIS,

Attorneys for Defendant,

Don Dorothy.

/s/ JOHN E MANDERS,

Attorney for Defendant, Pacific Northern Airlines,
Inc.

(Acknowledgment of Service.)

[Endorsed]: Filed March 3, 1948. [25]

HEARING ON MOTION FOR NEW TRIAL

Now at this hearing on motion for new trial in cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, came on regularly before the Court, the plaintiff not being present but represented by Wendell P. Kay, of his counsel, the defendants not being present but represented by John E. Manders, of their counsel. The following proceedings were had, to-wit:

Argument to the Court was had by John E. Manders, for and in behalf of the defendants.

Whereupon the Court having heard the argument of respective counsel and being fully and duly advised in the premises, denied motion for new trial.

Entered Court Journal No. G 16, Page 200, Mar. 19, 1948. [26]

[Title of District Court and Cause.]

PETITION FOR APPEAL

The above-named defendants, conceiving themselves aggrieved by the judgment made and entered on the 26th day of March, 1948, in the above-entitled cause, do hereby appeal from the said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error, which is filed herewith, and said defendants pray that this appeal may be allowed, that a citation may issue according to law, and that a transcript of the record, proceedings and documents upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioners further pray that a supersedeas may be granted pending the final disposition of this cause, and that the amount of surety may be fixed by the order allowing the appeal.

Dated at Anchorage, Alaska, April 26th, 1948.

/s/ JOHN E. MANDERS,

/s/ EDWARD V. DAVIS,

Attorneys for Defendants, Pacific Northern Airlines, Inc., and Don Dorothy, Respectively.

[Endorsed]: Filed April 26, 1948. [27]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FOR
SUPERSEDEAS

The petition of Don Dorothy and Pacific Northern Airlines, Inc., defendants in the above-entitled action, for an appeal from the final judgment rendered therein, is hereby granted and the appeal is allowed, and upon petitioners filing a bond in the sum of Ten Thousand Dollars (\$10,000.00) with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause and shall suspend and stay all further proceeding in this court until the termination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ ANTHONY J. DIMOND,

District Judge.

Dated April 26th, 1948.

[Endorsed]: Filed April 26, 1948. [28]

[Title of District Court and Cause.]

CITATION ON APPEAL

To the plaintiff, C. A. McCandless, and his attorneys,
W. N. Cuddy and Wendell P. Kay:

You and each of you are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California, forty

(40) days from the date of this citation, pursuant to the order allowing appeal on file in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, in that certain action pending in said District Court, entitled, "C. A. McCandless, plaintiff, vs. Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants," being No. A-4725 in the files of said District Court, and wherein Don Dorothy and Pacific Northern Airlines, Inc., are appellants and C. A. McCandless is appellee, to show cause, if any there be, why the judgment rendered against Don Dorothy and Pacific Northern Airlines, Inc., should not be corrected and why speedy justice should not be done to the parties in the premises and in that behalf.

Witness the Honorable Anthony J. Dimond, District Judge for the Territory of Alaska, Third Division, this 26th day of April, 1948, and of the Independence of the United States the 172nd.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed April 26, 1948. [29]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now come the defendants and appellant herein and file the following assignments of error upon which they will rely in the prosecution of their appeal to the United States Circuit Court of Ap-

peals for the Ninth Circuit, from the final judgment and entered in this cause on the 26th day of March, 1948, by the above-entitled court, as follows, to-wit:

I.

That the court erred in overruling the respective demurrers of defendants to the complaint of plaintiff on file herein, to which ruling defendants excepted and the exception was allowed.

II.

That the court erred in denying defendants' motion at the close of plaintiff's case to grant a non-suit on the ground that plaintiff had failed to prove a case as laid in his complaint, to which ruling defendants excepted and the exception was allowed.

III.

That the court erred in denying defendants' motion at the close of plaintiff's case to grant a directed verdict on the ground that plaintiff had failed to sustain the allegation of his complaint or of the relief demanded, and that plaintiff had failed to show any conversion of the property, the subject matter of his complaint, to which ruling defendants excepted and the exception was allowed.

IV.

That the court erred in again denying defendants' motion for a non-suit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint, to which ruling defendants excepted and the exception was allowed.

V.

That the court erred in again denying defendants' motion for a directed verdict at the close of the case on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of said complaint, to which ruling defendants excepted and the exception was allowed.

VI.

That the court erred in denying defendants' motion for a judgment notwithstanding the verdict on the ground that plaintiff had failed to prove a case as laid in his complaint, and, further, that plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of plaintiff's complaint, to which ruling defendants excepted and the exception was allowed. [31]

Wherefore, defendants and appellants pray that the judgments in the above-entitled cause be reversed and the cause remanded, with instructions to the trial court as to further proceedings therein and for such other and further relief as may be just in the premises.

JOHN E. MANDERS.

DAVIS AND RENFREW,

Attorneys for Defendants, Pacific Northern Airlines, Inc., and Don Dorothy, Respectively.

[Endorsed]: Filed April 26, 1948. [32]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND

Know All Men by These Presents:

That we, Don Dorothy and Pacific Northern Airlines, Inc., as principals, and M. E. Diamond and C. E. Diamond, as sureties, are held and firmly bound unto C. A. McCandless, in the full and just sum of Ten Thousand Dollars (\$10,000.00) to be paid to the said C. A. McCandless, his heirs, executors, administrators, successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of April, 1948.

Whereas, lately, at the January, 1948, term of the District Court for the Territory of Alaska, Third Division, in a suit pending in said court between C. A. McCandless, plaintiff, and Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, a judgment was rendered against the said Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants at the said January, 1948, term of Court, and the said Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, have petitioned for and been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and a citation has been issued directed to the said C. A. McCandless, citing him to appear in said court at San Francisco,

thirty (30) days from and after the date of such citation. [33]

Now the condition of the above obligation is such that if the said Don Dorothy and Pacific Northern Airlines, Inc., a corporation, shall prosecute the said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and effect.

PACIFIC NORTHERN

AIRLINES, INC.

By JOHN E. MANDERS,

Vice-President.

DON DOROTHY,

Principals.

M. E. DIAMOND,

C. E. DIAMOND,

Sureties. [34]

United States of America,

Territory of Alaska—ss.

M. E. Diamond and C. E. Diamond, being first duly sworn on oath, depose and say, each for himself and not one for the other; that I am a resident of the Territory of Alaska owning property therein; I am not a counsellor or attorney at law, marshal, clerk of any court or other officer of any court; that I am worth the sum of Ten Thousand Dollars (\$10,000.00) specified in the foregoing undertak-

ing, exclusive of property exempt from execution and over and above all just debts and liabilities.

M. E. DIAMOND,
C. E. DIAMOND.

Subscribed and Sworn to before me this 17th day of April, 1948.

/s/ WILLIAM H. OLSEN,
Notary Public in and for the Territory of Alaska.
My commission expires: 1/21/50.

The foregoing bond and undertaking is approved and allowed this 26th day of April, 1948.

[Seal] ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed April 26, 1948. [35]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Receipt is hereby acknowledged of copies of each of the following documents on appeal in the above-entitled action:

1. Petition for Appeal.
2. Order Allowing Appeal and Supersedeas.
3. Citation on Appeal.
4. Assignments of Error.
5. Supersedeas and Cost Bond.

Dated at Anchorage, Alaska, this 26th day of April, 1948.

/s/ WENDELL P. KAY,
Attorney for Plaintiff.

[Endorsed]: Filed April 26, 1948. [36]

[Title of District Court and Cause.]

PROPOSED BILL OF EXCEPTIONS

Be It Remembered:

That this cause came on for trial before the above-entitled court, sitting at Anchorage, Alaska, on the 24-25-26-27th days of February, 1948, the plaintiff appearing in person and by his attorneys, Messrs. Cuddy and Kay, the defendant, Don Dorothy, appearing in person and by his attorneys, Messrs. Davis & Renfrew, and the defendant, Pacific Northern Airlines, Inc., appearing by its attorney, John E. Manders, Esq., and the following proceedings were had. A jury having been impanelled and sworn did at the conclusion of the trial of said action render its verdict for the plaintiff and against the defendants and found that plaintiff was entitled to recover of and from the defendants the sum of \$7500.00.

Prior to the actual trial of the foregoing action, separate demurrers were filed by each of the defendants to the complaint and thereafter each of said demurrers was overruled by the court and the defendants granted ten days within which to answer the complaint.

The minute order overruling said demurrers is as follows:

Now at this time the plaintiff not being present in court but represented by Edward L. Arnell, of his counsel, the defendants not being present but represented by [37] John E. Manders and Edward V. Davis, of their counsel. Whereupon the following proceedings were had, to-wit: Argument to the court was had by John E. Manders, for and in

behalf of the defendants. Argument to the court was had by Edward L. Arnell, for and in behalf of the plaintiff. Argument to the court was had by John E. Manders, for and in behalf of the defendants. Whereupon the court, having heard the arguments of respective counsel and being fully and duly advised in the premises, overruled demurrer Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., defendants, and defendants given ten days within which to answer."

Opening statement to the jury was had by Mr. Kay for and in behalf of the plaintiff.

Opening statement to the jury was had by Mr. Davis for and in behalf of the defendants; Mr. Manders waived opening statement.

The Court: Counsel for plaintiff may call a witness.

Mr. Kay: Mr. C. A. McCandless, please.

The Court: Mr. McCandless may be sworn to testify.

CHARLES McCANDLESS,

being first duly sworn, testified in his own behalf as follows:

Direct Examination

By Mr. Kay:

Q. Will you state your name, please, Mr. McCandless? A. Charles McCandless.

Q. What is your address, Mr. McCandless—where do you live?

A. I live at the Fifth Avenue Trailer Court.

(Testimony of Charles McCandless.)

Q. And, Mr. McCandless, would you tell me what your occupation is?

A. I am a carpenter, working for B.J.L.

Q. Mr. McCandless, are you also, in addition to being a carpenter, a pilot? A. I am.

Q. How long have you been a pilot, Mr. McCandless?

A. Well, my first flying experience started back about 1924.

Q. Now, Mr. McCandless, turning back to last summer, I will ask you whether or not you were the owner of a Stinson SR9F aircraft?

A. Yes.

Q. Could you tell the jury, please, approximately when you acquired that plane, Mr. McCandless?

A. I bought the plane from United Airmotive July 15 of last year.

Q. And will you describe that plane to the jury, Mr. McCandless?

A. Well, the plane, as you say, is designated as Stinson SR9F, Gull Wing type; has a 450 HP Pratt and Whitney engine; five-place; equipped with full instrumentation, two-way radio communication, directional loop and has full flaps, Hamilton constant speed control propeller; it is equipped with new tires; the ship had just recently been completely majored in both air frame/and engine—that is, the air frame had been metalized and gone over completely and been recovered with Grade A fabric; the engine was factory majored, or over-

(Testimony of Charles McCandless.)

hauled by the factory, and was bought from the CAA. This was installed—all the instruments were completely overhauled, the radio was completely overhauled and in excellent condition. It was equipped and licensed for day or night flying; it was equipped with flares. It had hydraulic brakes, new tires, and was in generally first-class condition throughout.

Q. Now, Mr. McCandless, you stated that your occupation was [40] a carpenter. I neglected to ask you at that time how long you had been a carpenter?

A. Well, I have been a carpenter off and on ever since I have been working for the last 20—22 years. I worked for General Electric Company a number of years as a machinist—about nine years, to be exact.

Mr. Davis: You Honor, I forgot to do so previously. If there are any witnesses in the court room besides the parties, I would like to ask that they be excused.

The Court: All persons, except the parties, who are or who may be witnesses in the case are required to remain outside of the court room until individually called as witnesses. There is a witness room right directly across the hall to my right; and if counsel notice any witnesses, or persons who may be witnesses, in the room, they should advise the court immediately. If counsel know of any other persons who may be witnesses they should have them remain outside.

(Testimony of Charles McCandless.)

Mr. Kay: I see no one, your Honor, at the present time.

The Court: At the last trial a person who was called as a witness before she knew that she would be called had been in the court room about 20 minutes.

Mr. Cuddy: Your Honor, the question has just been raised. A party that is not going to be a witness—are they required to leave? Our contention is that they are not.

The Court: Parties can stay here; parties have a right to be present.

Mr. Cuddy: No, to be exact, sir, Mr. Manders just called my attention to Mrs. McCandless, who is here in the court room.

The Court: Well, if she is not a witness she may remain.

Mr. Cuddy: Thank you, sir.

Mr. Kay: May it please the Court? Mr. McCandless, I think I was asking you how long you had been a carpenter and, I think—had you completed your answer to that question?

A. I had; [41] practically all my life with the exception of the time for a period of years—about nine years, to be exact—I worked as a machinist for the General Electric Company.

Q. Now, Mr. McCandless, I will ask if you are acquainted with Mr. Dorothy, one of the defendants in this case? A. I am.

Q. Will you state the approximate date, if you

(Testimony of Charles McCandless.)

know, when you first made Mr. Dorothy's acquaintance?

A. Yes, it was on, I believe, a Wednesday evening—or afternoon—about shortly after six o'clock, in the first week in September.

Q. That would be on or about the third or fourth day of September, Mr. McCandless, to the best of your recollection?

A. I believe it was the fourth day.

Q. And will you state where that meeting took place?

A. It took place in the Fifth Avenue Trailer Court at my trailer.

Q. And, Mr. McCandless, will you, in your own words, tell the Court and jury just what took place on the occasion between yourself and Mr. Dorothy? What he said to you and what you said to him?

A. Well, as I say, on this Wednesday afternoon, I had gone—come home from work at B.J.L. I got off at six o'clock. I drove home and parked alongside the trailer where I usually do and was having some trouble with my voltage regulator on the car and I was working with that, and Mr. Dorothy came up—in fact, my wife brought him up. He had undoubtedly met her first and she brought him over and said: "Here's a man to see you." And I said: "Hello, I will be with you just a minute." And I let down the hood of the car and shut the car off and then Mr. Dorothy introduced himself. He said: "I am Don Dorothy, Chief Pilot of Pacific Northern Airlines." I think he said

(Testimony of Charles McCandless.)

PNA and I asked him what was that, and he said Pacific Northern Airlines. And he said: "I understand you have a Stinson airplane over here you want to sell." I said: "Yes. I am not just raring to sell it, but I will sell it if I can get the right price for it." He said: "What do you want for it?" "Well," I said, "\$8500 would be the least I would take for it." He said something to the effect that he thought that was rather a high price for it and I explained to him that the aircraft had just been completely majored in both air frame and engine, it was in absolutely top condition and there was at that time only some 65 or so hours on it since completely major. And he said: "Well, that they were needing a plane but he didn't know whether his company would pay that price for it or not. And I said "Well," I said, "that's the price I want for it and that's the least I will take. It's worth that much to me." And he said: "How about me taking that plane down to our hangar and let our mechanics look it over to see if it is in the condition you say it is in, and then when Mr. Woodley comes up from Seattle we can talk it over and let you know whether or not we will buy it." I said: "That will be all right. You can get the key from Stan Hill over at United Airmotive."

Q. Pardon me, just a moment. Did he indicate at that time when he expected Mr. Woodley.

A. No, he said something, if I remember correctly—a few days he said Mr. Woodley was expected up.

(Testimony of Charles McCandless.)

Q. All right, you may proceed now with what he said and what you said.

A. I told him that would be OK, that he could get the key from Stan Hill and take it down to his hangar and let his mechanics look it over, and when they get through inspecting it bring it back and tie it down where I had it. I had the corner position back of Roy Heaton's office—between Roy Heaton's office and United Airmotive. And he said OK, he would do that, and he started to walk away and then he turned around and he said: "Say, would you consider renting that plane?" I said: "Well, that all depends on the kind of proposition I am offered." [43] I said: "What do you offer?" "Well," he says, "it would naturally be on an hourly basis." and he said: "What would you want for it by the hour?" I said: "Well, I don't know. I have never rented a plane before," and, well—some hemming and hawing around, him trying to get me to make a statement as to how much I wanted and me trying to get him to make me an offer—horse trading, and dickering. Finally he said: "Here is what we usually do: For a plane of that type we offer \$35.00 an hour for actual flight time; we furnish our own maintenance, gas and oil and carry insurance on it." So I said: "Well, that sounds fair enough, but how much are you going to use it? I don't want to go and let the plane out just for an hour or so at a time. Maybe it will conflict with other plans of mine." "Well," he said, "I don't know." He said: "We are going to need a plane this Thursday or Saturday." He said: "Our Travelaire is being repaired and we think we

(Testimony of Charles McCandless.)

got to have a ship for then." So—but he still said that he didn't know just how much they would use it or if he would use it. He said he would have to see Mr. Woodley before he could let me know. So meantime, the folks in the trailer kept calling me—my wife kept calling me telling me my supper was cold. So I said: "You see Mr. Woodley and let me know," and he said: "OK," and walked away.

Q. Now, was there anything else said between you two on that occasion, or was that the final—

A. That was the final thing of it. He walked away and got in his car. He said: "I will see Mr. Woodley and let you know."

Q. Now, Mr. McCandless, what was done after that, if anything?

A. Well, there was nothing any more done on my part. I didn't see Mr. Dorothy after that and—I didn't see Mr. Dorothy after that until quite some time later. That was even after the—

Q. Of your own knowledge, do you know whether Mr. Dorothy took the plane down to the hangar or not to have it inspected? [44]

A. I didn't see it done, but over at United Air-motive they told me he had come got the key and took the plane down to the hangar and took it up for a test flight, and I was pretty het up because he took it off the ground without permission, because he didn't have any cockpit check. He might be a good flier, but I wouldn't let anybody take my plane off the ground unless I was with him the first time.

Q. Why was it you didn't observe whether or not Mr. Dorothy took the plane?

(Testimony of Charles McCandless.)

A. Why, I was working from seven until six and I didn't get home until about 6:20 every afternoon.

Q. Well now, Mr. McCandless, what happened, then, in the course of events, if you know?

A. Well, nothing else happened then through—that I know of, through Thursday, Friday and Saturday and I went to work Saturday morning. The plane was over on the line and I went over and checked the lashings on it, that is, I saw that the ropes were tight and everything, tied down properly, and I went on to work. When I come home after work at six o'clock that afternoon I saw the plane was gone. I went to the trailer and my daughters were there, and as soon as they saw me one of my daughters said: "Sit down, I want——"

Mr. Manders: Just a minute: I object to that testimony of the witness about the conversation of his daughter.

Mr. Kay: That is right.

Mr. Manders: It is purely hearsay.

The Court: Objection is sustained.

Mr. Kay: That is right. Mr. McCandless, you will have to confine yourself to the conversations that took place in the presence of Mr. Dorothy. What your daughter said to you will be a matter of her testimony, if she is called as a witness, and not your testimony.

A. Well, you have to excuse me, your Honor. I never been in court before so I don't know anything about the routines. I am just trying to tell a straight story.

The Court: That is all right. [45]

(Testimony of Charles McCandless.)

Mr. Kay: Do you, of your own knowledge, know what happened to the plane then after you saw it that Saturday morning? A. No, I don't.

Q. Now, have you seen Mr. Don Dorothy since that time?

A. Only on two occasions: One time, oh, it must have been a month or six weeks after the accident, I went into the Airport Cafe one day for lunch and I sat down beside Mr. Dorothy and kind of expected him to speak, but he didn't seem to recognize me or didn't know me, and finally I asked him: "Aren't you Don Dorothy?" He said: "Yes." I said: "Don't you remember me?" He said: "Well, your face is familiar but I don't believe I know you." I said: "Well, I am McCandless." "Oh," he says. That was all there was to it. Then I saw him over to the field there once since then, but he didn't speak to me or I didn't speak to him.

Q. Has the Pacific Northern Airlines, or Mr. Dorothy, ever returned this plane to you Mr. McCandless?

A. They have not. No one from the Pacific Northern Airlines or Mr. Dorothy has ever approached me since the time I talked with Mr. Dorothy at my trailer, on any matter. Excuse me: There was a young fellow came; said he was from Pacific Northern Airlines, after the accident. He wanted the serial number of the plane and some other information to make out an accident report. And that's the only time I have ever approached, or anything has ever been said to me by anybody from that corporation.

(Testimony of Charles McCandless.)

Q. Now, do you know where the plane is now, Mr. McCandless? A. Yes, I do.

Q. Will you tell the jury where it is and what the condition is?

A. Well, I saw the plane as it was drug in. It was pulled in behind a truck. I happened to be over at United Airmotive the day it was pulled down Fifth Avenue and I saw it; and it was taken over to Pacific Northern hangar and I walked around there to take a look at it, and it was in pretty sad shape—pretty well crushed down the top of the fuselage—that is the cabin [46] both wings were broken off, pretty well—all the radio and instruments and everything messed up with salt water and mud and battery acid all over it. In my estimation it was a complete loss.

Q. Now, Mr. McCandless, you stated, I believe, earlier that you have been a pilot since 1924?

A. No, I haven't been. I haven't held a license since 1924. I have held a license since 1939, but I was flying in 1924 as a student, which at that time we didn't require a license.

Q. Well now, how long have you been dealing in aircraft, if you have been? Tell the jury what your experience has been as far as buying and selling and dealing in aircraft is concerned?

A. I have never dealt in aircraft. Only think I have ever done, I have owned three airplanes—four airplanes—at different times that I bought for my own personal use. But I have been around air fields—been interested in aviation practically all my life—and know a little about airplanes.

(Testimony of Charles McCandless.)

Q. Do you keep yourself informed on the prices and values of aircraft, Mr. McCandless?

A. Fairly well, yes.

Q. And were you keeping yourself informed as to the prices and values of aircraft in and around Merrill Field in Anchorage, Alaska, during last summer and particularly during September of 1947?

A. Yes. I had a two-place airplane at the time and I was looking around—shopping around—trying to get a four or five-place plane, because there are five in my family and we couldn't all go out together in a two-place airplane. So I was pretty well familiar with all the prices on Merrill Field at that time.

Q. And were you thoroughly familiar with the aircraft in question, the Stinson SR9F—the aircraft owned by you at that time?

A. I had never flown a ship of that type before, but I liked the airplane and it was offered for sale at what I considered was a very good bargain and I made rather extensive investigation into it as to the value of it before I bought it. [47]

Q. All right, Mr. McCandless, do you, or did you at that time, keep yourself informed of the prices of aircraft through any journals or periodicals?

A. I get the Trade-A-Plane news all the time. It's a paper that is sent to most pilots and airports, and so forth, that publishes all the airplanes for sale or trade or for charter rent and all such stuff as that, throughout practically the whole country—the United States.

Q. Well now, Mr. McCandless, I will ask you: What was the value of your Stinson SR9F aircraft

(Testimony of Charles McCandless.)

—the condition of which you have described to the jury—on the morning of September 6, 1947?

A. Well, from my own observation of, as I say, in the Trade-A-Plane, similar planes for sale, estimates that other pilots that were in the know had made on the airplane, people on Merrill Field estimates that they had made—that plane was worth anywhere from nine to eleven thousand dollars.

Q. Would you state the reasons for your opinion in placing that valuation on the plane?

A. Yes, because planes of the same type—I had seen several advertisements in the Trade-A-Plane of airplanes of that type for sale in the United States were advertised anywhere from 85, 89—and on one occasion a plane that answered almost exactly the description of mine and condition, it was listed for \$9,500, plus ferry charges to Alaska, which amounts to anywhere from 600 to a thousand dollars, depending on how you bring it up and who brings it up.

Mr. Kay: Pardon me a moment. You may cross-examine.

The Court: Counsel for the defendant may examine.

Cross-Examination

By Mr. Manders:

Q. Mr. McCandless, how long have you been a pilot?

A. Well, I can give you the exact date by my license. I became a student pilot in 1939. Due to finances at the time I didn't get—didn't complete my

(Testimony of Charles McCandless.)

course and get my license until April 12 of 1946. I hold a private license. [48]

Q. And what does that private license entitle you to operate?

A. Any aircraft with engine, land, that I have been checked out in.

Q. Does it entitle you to carry passengers?

A. It does.

Q. For hire?

A. Nope. I could carry passengers and let them pay the expenses on the plane, though.

Q. When was this plane built? When was it manufactured?

A. I don't recall right at the time. I didn't go by when the plane was built; I went by the condition of the aircraft at the time.

Q. Do you know what model it is?

A. It is SR9F.

Q. What year model is that?

A. I think that's a '39, but I am not sure. I would have to look up the records on it.

Q. Would it be a '37?

A. I don't believe it was that old, although I say, I am not sure because I didn't look it up.

Q. Now, will you tell me on what date you had this conversation with Mr. Dorothy?

A. I haven't looked up the date, but I think it was the third of September.

Q. Third of September?

A. Third or fourth—it was on a Wednesday evening. I didn't look up on the calendar to see when it was.

(Testimony of Charles McCandless.)

Q. Wednesday evening? And what time was it?

A. Oh, shortly after six o'clock—between six and six-thirty. It generally took me about 15 minutes to drive home from work.

Q. Had you worked all that day?

A. I had.

Q. At that time you were working for whom?

A. B.J.L.

Q. What was that conversation?

A. Shall I repeat the whole thing?

Q. That's what I asked you.

A. Mr. Dorothy came up to me and introduced himself and said: "I am Don Dorothy of the PNA," and I asked him: "What's the PNA?" And he said "Pacific [49] Northern Airlines, across the street." He said: "I understand you have a Stinson for sale." I said: "Yes, I will sell it," or words to that effect. He said: "How much you want for it?" I said: "\$8,500." I said: "The plane is in perfect condition; completely majored throughout, and got 65 or so hours on it at the present time," and he made the remark to something that it seemed like a lot of money for it and I went on and explained to him all about the ship, the condition of it and so forth and so on. And he kind of talked around about the condition of the plane and said he would like to take it down to PNA's hangar and let their mechanics look it over and inspect it to see if it was in the condition I said it was. I told him that would be all right to taxi it down to his hangar and he could get the key from Stan Hill at United Airmotive, and after he looked it over to bring it back and tie it down on the

(Testimony of Charles McCandless.)

line where it was. He said OK he would. He started to walk away, and he turned around and he said: "Would you consider renting the plane?" I said: "Well, I might. It depends on what kind of proposition you can get." So I asked him what he would offer me and he asked me what I wanted on an hourly basis, and he finally said that the way they did it, when they rented a plane from someone else, that is, a plane of that type, that they paid \$35.00 an hour and furnished their own gas, oil and maintenance and carried the insurance on the plane. I said: "Well, that sounds fair enough," or "That sounds OK,"—some remark like that—and I said how much—"but how much would you use it?" He said: "Well, I don't know," he said, "Our Travelaire is in being repaired at the time and we are going to need a ship"—I think he said for Thursday or Saturday, and he said: "But I don't know whether we will use it at all or not nor how much we will use it until I see Mr. Woodley." He said Mr. Woodley would be up here in a [50] few days—or he told me that when he was talking about buying the plane. He said when he saw Mr. Woodley he would let me know. I said: "OK, when you see him if you want to use it you come back and let me know," and he said, "OK," and got in his car and drove off.

Q. That the only conversation you had with Mr. Dorothy? A. As far as I recall, yes.

Q. Where did that take place?

A. At my trailer at the Fifth Avenue Trailer Court.

Q. Did you ever have any other conversation with

(Testimony of Charles McCandless.)

Mr. Dorothy, subsequent to the one you just recited?

A. The only conversation I had to him direct was at the time I asked him—set down alongside of him in the restaurant and asked him wasn't he Don Dorothy and he said yes; and then I had a telephone conversation with him.

Q. Oh, you had a telephone conversation with him? A. Yes.

Q. When was that?

A. That was after I had been told about the accident—that the plane was crashed. I called him up on that Saturday night. I had quite a bit of trouble getting ahold of him and I was pretty stewed up about the plane being crashed, and I asked him what it was all about and what the company was going to do about it. Told him he didn't have any permission to take the airplane, and he said that he did—over the phone. I told him he didn't, that we had never entered into any agreement and I had never given him any permission to take the plane and—or even take the plane off the ground to make a check flight on it. He said: Well, that was going to be up to his company. I said something to the tune he had taken the plane and cracked it up without permission and I was expecting a check from PNA for \$8,500 to cover the cost of it.

Q. Now, how did Mr. Dorothy get the key to the plane?

A. He got it from out of the desk drawer at the United Airmotive Company. [51]

Q. Did he go in and take it?

(Testimony of Charles McCandless.)

A. I don't know; I wasn't there—like I say, what I was told——

Q. No, you can't——

A. All right; I had left the key in charge of the United Airmotive because they was doing some work on the plane for me.

Q. And on this day—whether it was the third or the fourth—the day of the conversation with you, was that the day that he took this airpalne down to Pacific Northern hangar?

A. No, he didn't take it that day.

Q. When did he take it?

A. I don't know, to my certain knowledge, but I was told he took it Thursday—the following day.

Q. Then what happened to the plane, do you know?

A. The next I saw of it it was tied down on the line where it was—where I kept it all the time.

Q. When was that you saw it?

A. Well, it was there Friday and it was there Saturday morning when I went to work.

Q. What time Saturday did you see it—I mean Saturday, September 6?

A. About between 6:30 and a quarter of seven.

The Court: If counsel will suspend we will take a recess at this time.

Mr. Manders: Very well, your Honor.

The Court: Court will stand in recess until 3:15.

(Whereupon recess was had at 3:05 o'clock p.m.)

(Testimony of Charles McCandless.)

After Recess

The Court: Without objection the record will show all members of the jury present. The witness may resume the stand. Counsel may resume his examination.

Mr. Manders: Mr. McCandless, have you ever chartered this plane before?

A. On one occasion I hired a pilot to take some construction men up to Aniak, near Bethel.

Q. Who was that charter with?

A. Morrison-Knudsen. [52]

Q. And when was that?

A. I don't recall the exact date; it was sometime in August.

Q. And what was the charter price?

A. I beg your pardon?

Mr. Cuddy: We object, if the Court please—immaterial; no part of the issues here whether he chartered the plane to Morrison-Knudsen sometime ago.

Mr. Manders: It is material, Mr. Cuddy, and it goes to the question of insurance and the method of chartering an airplane.

The Court: You may answer. Overruled. You may answer, sir.

Mr. Manders: At what rate?

A. If I remember correctly—I would have to look up my records to see—it is the only occasion I ever did and I don't remember it—it was either 50 or \$55.00 an hour.

Q. All right, now: At the time, whether it was

(Testimony of Charles McCandless.)

50 or \$55.00 per hour—whatever that figure was—you at that time furnished the pilot?

A. I did.

Q. What else did you furnish for that airplane at that time?

A. I furnished the—well, the gas and oil and the plane.

Q. Anything else?

A. That's all I know of.

Q. Did you have it insured?

A. At the time it was insured, yes.

Q. At that time it was insured? A. Yes.

Q. About that——

A. The charter was made through the United Airmotive as they had the insurance on the plane at that time. You see, I just recently purchased it and——

Q. You had just recently purchased it?

A. Yes.

Q. All right. Now——

A. And we hadn't had time to have the insurance changed around; and after that I decided that the insurance—after I checked into it, I found that the insurance rates were too high and that I wouldn't have it insured at that time. [53]

Q. Mr. McCandless, what type of insurance was that?

A. Oh, I don't know—that is, positively. It was more or less of insurance covering the airplane and the passengers—full coverage.

Q. Full coverage? A. Yes.

Q. Now, in this conversation that you had with Mr. Dorothy—you say that was a Wednesday afternoon?

(Testimony of Charles McCandless.)

A. I can't be positive. It has been so long ago, but I believe it was.

Q. Wednesday? Wednesday was the third day of September?

A. I believe that's right. This all happened—this thing has strung out here for better than six months and some of this stuff—minor details are a little hazy.

Q. Did your conversation with him first relate to the rental or to the sale?

A. The first part of the conversation related exclusively to the sale of the airplane. In other words, he talked as if the PNA would buy the ship.

Q. And did he state that Mr. Woodley was going to be here?

A. He said that he expected Mr. Woodley up within a few days. I think that was his exact words.

Q. He didn't say that they would have to notify the Seattle office, did he?

A. I don't recall whether—I don't believe he did. The way—from the gist of his conversation—you see, I didn't know Mr. Woodley; I didn't know Don Dorothy; I didn't know who PNA or anybody was at that time, and I took it from the gist of his conversation Mr. Woodley was the owner of PNA and that he was the big boss and would have to sanction any deal whatever.

Q. No, there was another conversation, as I understand your statement here, subsequent to this conversation on the third?

A. What do you mean, subsequent?

(Testimony of Charles McCandless.)

Q. Afterwards? You talked to Mr. Dorothy afterwards, did you not?

A. The only time I talked to him regarding the plane after that was over the telephone. [54]

Q. All right, when was that?

A. On the following Saturday night—the Saturday night of the plane crash.

Q. Did you talk to Mr. Dorothy then?

A. I presume it would be Mr. Dorothy. He seemed to know what it was all about and knew the conditions of everything—as well as you can know of whom you are talking to over a telephone.

Q. Was it a man or woman?

A. It was a man.

Q. Did you have another conversation with him after that?

A. None other than what I told you of at the time in the restaurant.

Q. Did you have a conversation with him on Sunday morning?

A. I believe I did call him up again Sunday morning.

Q. And where did you talk to him—at what place where you telephoning?

A. I think I called him from the office of the United Airmotive.

Q. And who was present there at that time?

A. I don't remember.

Q. Do you know the men that operate that hangar—that United Airmotive? A. Very well.

Q. What are their names?

A. There's Paul Kroenung, Stanley Hill and

(Testimony of Charles McCandless.)

Woody Epps; Frederick Shaw was there, but he is not connected with them any more.

Q. Now, with those names in your mind—were any of those gentlemen present when you talked to Mr. Dorothy? A. Over the telephone?

Q. Uh-huh?

A. I believe they were, but I couldn't swear as to who they were or who was there. I was pretty well torn up by the fact I had \$8,500 worth of airplane cracked up down on the beach and nobody doing anything about it.

Q. Now, after your talk with Mr. Dorothy on the third, did you have any conversation with United Airmotive regarding this plane of yours?

A. Oh, I talked to the fellows around there, yes.

Q. You had given permission to Mr. Dorothy, had you not, to take the plane down to Pacific Northern Airlines hangar.

A. I had, for inspection purposes only.

Q. Then what was your conversation at the United Airmotive hangar the next day with any of those owners or operators of that hangar?

A. I don't know. I talked around there quite a bit about it. I was griping quite a bit about someone taking my airplane without my permission and taking it off and wrecking it, and when I ask for a settlement I don't get the courtesy of some one coming to see me.

Q. Just a moment—that isn't the question I was asking.

A. I don't know what you were referring to. Be a little more explicit.

(Testimony of Charles McCandless.)

Q. The day following the conversations you had with Mr. Dorothy—you talked to him on the third of September, then on the fourth of September is what I am now relating to—did you have a conversation with one of the owners or operators of the United Airmotive respecting this plane?

A. I don't remember whether I was there the next day or not because they close up around 5:30 or six o'clock and if you will remember I didn't get off work at that time until six. Sometimes they were there in the afternoons; sometimes they wasn't.

Q. I am speaking of the day of the fourth of September.

A. I don't remember.

Q. You know when you went to work the day of the fourth of September?

A. At the usual time, I presume: seven o'clock in the morning.

Q. Do you know how long you worked that day?

A. All day, I guess.

Q. As a matter of fact, did you work all day that day?

A. I am pretty sure I did. However, it could be found—I presume [56] it could be found out from the employment records out there if it was necessary.

Q. If the employment record that day showed you worked a half a day, would that be right?

A. I don't know.

Q. Well, would their employment records be——

A. It seems along about that time I did have a half day off for something. I was having trouble with my car at the time and I might have taken off to fix that, but I really honestly don't remember it.

(Testimony of Charles McCandless.)

Q. All right. Now, Mr. McCandless, coming back to Thursday, the fourth of September: Did you have any conversations that day with anyone of the men at the United Airmotive respecting your airplane?

A. Well, that I can't say, sir, because every time I went in there I naturally was talking about my airplane. I was quite proud of it—just had got it and like a kid with a new toy, I guess, I was talking about it all the time. I don't know what you are driving at.

Q. Just what I say: Did you have any conversations that day with anyone at United Airmotive about your airplane?

A. If I was in there that day I probably did.

Q. Well, did you?

A. I don't know whether I was in there that day or not.

Q. Did you ever have a conversation with one of the men there at the hangar regarding a written contract about this airplane?

Mr. Cuddy: If the Court please, we would like to know the name of the man and ask it be included in the question.

Mr. Manders: Did you have any conversation——

The Court: Overruled.

Mr. Manders: Very well, your Honor.

A. I don't know. I don't know what you are driving at, sir. I am sorry.

Q. Let me ask you the question again—or will you read [57] the question, Miss Reporter?

(Reporter read the question.)

(Testimony of Charles McCandless.)

Mr. Manders: On the day of September the fourth, 1947?

A. Well, I am not positive as to that. The only thing I know of I did was talking to Freddy Shaw one day and Woody Van Epps—or Woody Epps—and I told him that Don Dorothy had been over to see me about renting the airplane and that he was going to let me know that weekend whether or not they were going to use it, and—but I wasn't going to rent it to them unless I had an agreement in writing. That might be what you are referring to, because I was at the time I was still pretty well burnt up that Don had taken the ship off the ground, as I say, without a cockpit check or even a check flight.

Q. Well, who would have checked that plane?

A. I would have.

Q. You authorized to do that?

A. It was my airplane and I was familiar with the airplane. Every airplane is different, Mister; I don't know whether you know it or not. There is no standardization of instrument control panels or controls, that is, intermediate control, and a pilot can get into a strange airplane and get fouled up pretty doggoned easy.

Q. Let me ask you: Did you hold a mechanic's certificate as authorized by the CAA?

A. I do not.

Q. Well then, you wouldn't be in a position to know say, whether that plane was mechanically correct or not?

A. I have flown the airplane.

Q. I am speaking of a check-out.

A. For a check-out, yes.

(Testimony of Charles McCandless.)

Q. You couldn't have issued a check-out?

A. I could have.

Q. You could have?

A. Yes; it was my airplane.

Q. Now, did you have any other conversations with Mr. Dorothy, or telephone calls with him, in addition to the ones you related and including the one of Saturday night, the sixth? [58]

A. I think Saturday night and Sunday morning was the only times that I talked to him.

Q. All right, now, what was that conversation Sunday morning?

The Court: Which one?

Mr. Manders: The telephone conversation of Sunday morning.

A. Well, it was more or less the same thing as it was Saturday night. I asked him if he had done anything about the airplane—if he had seen Mr. Woodley or what they were going to do about it. He said that I had rented the airplane to him and that he had cracked it up and it was my baby—something to that effect. Said they wasn't going to do anything about it. He said that—let's see, how in the heck was it? It was something about he hadn't seen Mr. Woodley yet, or something to that effect, and I said: "Well, I can't help whether you have seen Mr. Woodley or not. You have taken my airplane without permission and I want my check for \$8,500."

Mr. Manders: Has the Court the file there—the complaint?

The Court: Yes.

(Testimony of Charles McCandless.)

Mr. Manders: I would like to show that to the witness.

(Court handed the file to the witness.)

The Witness: That is——

Mr. Manders: If you will open that file, Mr. McCandless, there is a complaint in there. Would you look at page 2 of the complaint? Do you notice the second paragraph on that page is numbered in Roman numerals “V”?

A. Yes.

Q. Now, will you look at the—one, two, three, four, five—five last lines of that paragraph?

A. Yes.

Q. See if they read as I am reading it?

“That while the defendant, Don Dorothy, had said Aircraft at said towns”—referring to Kenai and Kasilof—[59] “the said Don Dorothy did at times unknown to the plaintiff convert said Aircraft to the use and benefit of the defendant corporation by engaging in the hauling of mail, freight, and passengers between said towns.” Is that correct?

A. That’s what it says here.

Q. Now, Mr. McCandless, that is your complaint in this action, isn’t it? That’s a part of your complaint in this action?

A. Well, that’s what the lawyer drew up. I don’t know anything about law.

Q. Just a minute: Will you turn to page 3? Is that your signature?

A. It is.

Q. “C. A. McCandless, Plaintiff”?

A. That’s right.

Q. Is that your signature below that: “C. A.

(Testimony of Charles McCandless.)

McCandless" and underneath that: "Subscribed and sworn to before me this 1st day of October, 1947, Edward L. Arnell, Notary Public" and so forth?

A. That's my signature, yes.

Q. And you swore to the complaint on that day?

A. Yes, sir.

Mr. Manders: That's all.

Mr. Kay: Is that all, Mr. Manders?

Mr. Manders: Just one moment. Mr. McCandless, do you have any nick name?

A. Just called Mac.

Q. You don't have a nickname of Bob, do you?

A. No, I don't.

Q. You weren't recently involved in a flight of an airplane with one ski gone, were you?

A. I landed a plane on Merrill Field with only one ski on it, yes. There was a piece in the paper about "Bob McCandless." I don't know where it came from. That was just some reporter's idea.

Q. That was you then?

A. There was a correction later, that gave my name correctly; yes.

Q. Was that plane yours?

Mr. Cuddy: Oh, we object, if the Court please—immaterial, no part of the issues here. [60]

The Court: Objection is sustained.

Mr. Manders: That's all.

The Court: Any further cross-examination?

Mr. Davis: No, your Honor.

The Court: Any redirect examination?

Mr. Kay: Pardon me just a moment, your Honor?

The Court: Yes.

(Testimony of Charles McCandless.)

Mr. Kay: No further questions, your Honor.

The Court: Have the jurors any questions? Jurors have a right to ask questions, within limitations, of course. That is all, Mr. McCandless; you may step down. Plaintiff may call another witness.

Mr. Kay: I would like to call Miss Grace McCandless. I think she will be found in the witness room.

The Court: Miss McCandless may be called.

GRACE McCANDLESS

being first duly sworn, testified for and in behalf of the plaintiff as follows:

The Court: Miss McCandless, you will save us all a lot of grief if you will speak loud from the beginning.

The Witness: All right.

The Court: It is necessary to argue with witnesses and jurors and counsel, too. It will save a lot of time and effort if you will speak loud enough for us all to hear. All right, counsellor.

Mr. Kay: Thank you, your Honor.

Direct Examination

By Mr. Kay:

Q. Will you state your name, please, Grace?

A. Grace McCandless.

Q. Can you speak a little louder than that, now?

A. Grace McCandless. [61]

Q. Where do you live, Grace?

A. Fifth Avenue Trailer Court.

Q. Are you related to the plaintiff in this case, Mr. C. A. McCandless?

(Testimony of Grace McCandless.)

A. Yes, he is my father.

Q. How old are you, Grace? A. 18.

Q. When was your birthday?

A. Day before yesterday.

Q. Are you in school? A. Yes.

Q. Now, going back to the first week in last September, Grace, were you here in Anchorage at that time? A. I was.

Q. And were you living at the Fifth Avenue Trailer Court? A. Yes.

Q. Now, on the evening of September 3, 1947, did you hear a conversation which took place outside your trailer between your father, C. A. McCandless, and Mr. Don Dorothy? A. Yes.

Q. Will you state the circumstances, Miss McCandless, under which you heard that conversation?

A. Well, they were standing right outside the trailer right underneath the window and I was seated at a table right by the window eating my supper.

Q. Could you hear what Don Dorothy was saying to your father and what your father was saying to him? A. Yes, the window was open.

Mr. Manders: I still can't hear, your Honor.

The Witness: Yes.

The Court: Can counsel hear the witness?

Mr. Manders: Just faintly.

Mr. Kay: Please try to speak just as loud as you can, Grace. A. OK.

Q. Now, I will ask you if you will tell the jury in your own words, Grace, just what took place on that occasion? Tell what Mr. Dorothy said to your

(Testimony of Grace McCandless.)

father, if anything, and what your father said to him.

A. Well, it was one night right after Dad got out of working. Mr. Dorothy came up to my father and he says: "Are you Mr. McCandless?" My Dad says: "Yes," and he said that [62] he was Don Dorothy from the PNA, and he says: "I understand that you have a Stinson plane to sell." Dad said: "Yes." He asked him how much he wanted for it and my Dad says \$8,500 and Don Dorothy seemed to think that that was quite a bit, he didn't know if the company would pay that much or not. And Dad went on to explain that it was a brand new ship, just remodeled, and everything else, and Don says well, he couldn't say for sure anything about it until he saw Woodley when he come up from Seattle, and he asked Dad if he couldn't take the plane down to the hangar and have it checked over—have his mechanic check it—and my Dad gave him permission. And then he asked him if he would consider renting it, and Dad says, well, what would he offer? And Don Dorothy told him, well, it was usually—they gave them \$35.00 an hour, gas, maintenance, oil and insurance, and then my Dad said: "Well, that sounds fair enough." And Dad asked him how much would he use it. Well, he said he couldn't say for sure because he didn't know if he was going to use it or not until he saw Woodley, and Dad said, "Well, you let me know about it;" he said, "OK, I will let you know as soon as I see Woodley if we will even use it or not." I think that was all.

Q. Now, after this conversation did you speak to your father, then, in connection——

(Testimony of Grace McCandless.)

A. Well, I was waiting for him to come in for supper. I had cooked supper and it was getting cold. I told him to come on in.

Q. Now, I will ask you if you ever saw Mr. Dorothy again after that evening, Miss McCandless?

A. Yes.

Q. And when was that?

A. It was a Saturday night, September the sixth.

Q. Do you recall about what time in the evening that was?

A. Not exactly. It was sometime that night, but I know it was before my father got out of work—about 4:30, I think. [63]

Q. And where were you on that occasion?

A. I was at the trailer.

Q. And did Mr. Dorothy come to the trailer?

A. Yes.

Q. And will you state, just tell the jury, what he said to you and what you said to him?

A. Well, first he asked if my father was there and I told him no, he was still working, and he said: "Well, I had a little bad luck today," and, naturally, I asked him what happened, and he says that he took the plane down to Kenai and landed on the beach and he hit a soft spot and the plane tipped over. And I asked him, well, wouldn't he do anything about it? You know, I didn't know the situation. And he said no, there was a big cliff there and everything and they couldn't get it up over the cliff—you know, with the tide out—and he says as soon as the tide come in it would just wash it out—it would be a total wreck. So I told him I would tell Dad.

(Testimony of Grace McCandless.)

Q. And did you have any further conversation with him then, or was that all?

A. That was all.

Q. Now, did you have any further conversations with Mr. Dorothy at any time after that that you recall, Grace?

A. I never saw him again until today.

Mr. Kay: Your witness.

The Court: Counsel for defendant may examine.

Cross-Examination

By Mr. Manders:

Q. Miss McCandless, on this afternoon of the third of September that you have just testified about, where were you at that time the conversation was held between your father and Mr. Dorothy?

A. Well, they were standing right by the window outside the trailer, leaning on the car, and the car was right next to the trailer, and I was sitting at a table right inside the trailer right under the window eating my supper, and the window was open.

Q. Were they in plain view of you?

A. Yes, I could see them. [64]

Q. You don't know whether there was any other conversation between them than what you have related here? A. That's all.

Q. I say you don't know whether there was or not?

A. I don't know. I mean, I heard everything that went on. That was all.

Q. What you heard? A. Uh-huh.

(Testimony of Grace McCandless.)

Q. But did you know whether or not there was any other conversation between them?

A. There wasn't.

Q. Did you see your father arrive?

A. Yes, I did.

Q. Did you see Mr. Dorothy arrive?

A. Well, I know my Dad just got home and at the time I believe Mr. Dorothy must have come up right at the same time.

Q. There could have been a conversation without your knowing it, though, couldn't there?

A. No, because I saw Dad's car come up and then I heard Mr. Dorothy introduce himself.

Q. Where was the automobile of your father at that time in relation to the trailer?

A. Oh, it was just a couple of feet from the trailer.

Q. Which direction was it headed?

A. Oh, I believe it's north. It was facing the back of the trailer court. I believe that's north.

Q. How many feet would you estimate the distance was between the trailer and the automobile where your father and Mr. Dorothy were?

A. Oh, it was about four feet, I imagine—four or five feet, something like that. It wasn't far. I am not positive of that.

Q. It wouldn't be ten, would it? Could it be ten?

A. I am not sure; I don't know. It wasn't far.

Q. You are not a judge of distance, then?

A. No, I don't think you better—because I don't know.

(Testimony of Grace McCandless.)

Mr. Manders: That is all.

Mr. Cuddy: No further questions. [65]

The Court: Have the jurors any questions? That is all, Miss McCandless; you may step down.

The Witness: Do I have to go back out there?

The Court: You had better remain outside of the court room because if you don't you may not be called—unless counsel agree.

Mr. Cuddy: No, we may have to recall Miss McCandless.

The Court: All right, you had better wait out there, Miss McCandless.

Mr. Kay: Your Honor, I have two more witnesses who are on their way down here.

The Court: We will take our recess now. Court will stand in recess until four o'clock.

(Whereupon recess was had at 3:50 o'clock p.m.)

After Recess

The Court: Without objection the record will show all members of the jury present.

Counsel for the plaintiff may call another witness.

Mr. Kay: Your Honor, plaintiff calls W. O. Epps.

The Court: Are there any other witnesses in the court room?

Mr. Kay: I believe our only other witness is in the witness room, your Honor.

The Court: Very well.

W. O. EPPS,

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Epps, I would like to warn you that the accoustics in here are very poor, as you can notice, and that you will probably have to speak in a somewhat louder tone of voice than you ordinarily do. Would you state your name, please?

A. W. O. Epps. [66]

Q. And where do you live, Mr. Epps?

A. I live over in the V. A. housing.

Q. That is here in Anchorage, Alaska?

A. Yes.

Q. And what is your occupation, Mr. Epps?

A. Aircraft business.

Q. Are you one of the stockholders and owners of the United Airmotive Corporation?

A. That is correct.

Q. What is your age, Mr. Epps? A. 32.

Q. And how long have you been engaged in the aircraft business?

A. Oh, about six or seven years.

Q. During that time what has been the nature of your work in aircraft, would you tell the jury, please?

A. Well, I was an instructor during the war, and after the war I was ferrying and selling aircraft for the Southwestern Aero Exchange in Tulsa, Oklahoma. After that I came up here and instructed

(Testimony of W. O. Epps.)

for the Northern Air Trading Service and then we went into business for ourselves—three more fellows and myself.

Q. Have you attended any specialized schools or had any specialized training in aircraft work, Mr. Epps?

A. Nothing except the government—Army.

Q. Army training? A. That's right.

Q. Now, how long have you been in that business here in Anchorage, did you state? I am sorry.

A. About—came here a year ago last June.

Q. Since that time have you been engaged in the buying, selling and trading and repair and so on and so forth of aircraft?

A. Well, for about the last ten months I have, since we have been in business—in United Airmotive.

Q. Where is the location of your business?

A. At Merrill Field.

Q. Are you familiar with the literature and periodicals on [67] the question of value of aircraft, Mr. Epps?

A. Fairly well. We have sold quite a few since we have been in business out here.

Q. Do you try to keep yourselves fully informed on the prices and sales and deals and dickers going on around Merrill Field?

A. Well, we almost have to to survive.

Q. Now, Mr. Epps, I will ask you whether you are familiar with the Stinson SR9F aircraft that was owned by Mr. McCandless last summer?

(Testimony of W. O. Epps.)

A. Well, I helped rebuild it and I flew it some. That's about it.

Q. By rebuilding it, would you mind telling the jury just what was done, if you remember?

A. Well, the aircraft was flown up here by a CAA representative and it was sold to us through the War Assets. In rebuilding it we had to recover it, put the engine in it, reupholster it, put new tires on it. That's about——

Q. Would you tell the jury, please, what the condition of that aircraft was as you knew it in August and early September of 1947?

A. Was that after it was rebuilt? I don't remember.

Q. Yes, sir, that was after it was rebuilt.

A. It was in A-1, tip-top shape.

Q. And you consider yourselves fully familiar with the aircraft in question?

A. That is correct.

Q. Now, Mr. Epps, I will ask you what in your opinion was the value of that aircraft on or about September 6, 1947? That is the date, for your information, on which the accident took place.

A. Well, I would say it was around eight, nine thousand dollars.

Q. Would you tell the jury, please, in your own words, Mr. Epps, your reasons for that opinion?

A. Well, when we rebuilt the airplane was gone all over and we spent, I would say, three or four months rebuilding it—four of us—and it was—had a new engine in it—it was factory overhaul, which

(Testimony of W. O. Epps.)

is the same as a new aircraft engine; starts at zero hours—had all new fabrics, [68] was all metalized, all new instruments, reupholstered, and it was in A-1 shape. And the aircraft—there's no others in Alaska that I know of that is the same model as that. We took it to Fairbanks and tried to sell it; we were going to sell it because we needed the money. And we asked Wien from the Wien Alaska Airlines what he thought the airplane was worth—he was figuring on buying it because he had a Navy contract—and he said he estimated the value of it at \$11,000. So we figured it was worth \$8500; so that was our asking price when we sold it.

Q. Were you advertising it for sale at 8500?

A. I don't remember whether it had the price on it in the paper or not, but we advertised it.

Q. Now, as a matter of fact, Mr. Epps—I know you will be asked this anyway—what was the price?

A. We sold it for \$5,000 and a 1946 all metal Luscombe.

Q. And what valuation?

A. We valued the Luscombe at 2500 and sold it for \$2000.

Q. How do you explain the discrepancy between the valuation that you placed on the plane and the amount for which you sold it?

A. Well, we figured if we kept it we could get the 8500 that we were asking, but as I said we needed the money. We owed a note at the bank and we paid that note off with the difference.

Q. And you figured Mr. McCandless got a bar-

(Testimony of W. O. Epps.)

gain? A. I figure he did, yes, sir.

Mr. Kay: I believe that is all, Mr. Epps. Your witness.

The Court: Counsel for the defendant may examine.

Cross-Examination

By Mr. Manders:

Q. Mr. Epps, are you familiar with the trade journal called Trade-A-Plane Service?

A. Yes, sir.

Q. Were you familiar with that journal?

A. Yes, I am.

Q. At this time?

A. We get it twice a month. [69]

Q. Of the sale? A. Yes, sir.

Q. What year model was this airplane?

A. Let's see—I don't know just exactly what year it was built. I could look on the registration certificate and tell.

Q. Well, would it be correct if I said it is approximately the year 1937?

A. I was thinking it was a '39—not positive on that.

Q. Assuming it to be a '39, what would be the market value of such a plane on the Outside?

Mr. Cuddy: We object, if the Court please. It is not proper cross-examination. It is not fair for the valuation of the plane. The question should be, what is the value of that plane at Merrill Field.

The Court: Objection sustained.

Mr. Manders: If the Court please, I think we

(Testimony of W. O. Epps.)

are entitled to an answer to that question for this reason: The replacement value of an airplane and the market value is usually the going rate.

The Court: In the area, I think—generally in the surrounding area, Mr. Manders. That is my understanding of it.

Mr. Manders: Well, here we have a situation: Most of these planes are purchased on the Outside and brought up here. The ferrying charges are extra. The plane costs the same; it is the ferrying charge that makes the difference. I think under those conditions this witness should be able to testify—he says he is familiar with this trade journal—what is the price of such a plane as this on the Outside?

Let me put it this way, Mr. Epps—

The Court: I am dubious about it, but rather than shut out something that the jury should hear, the question may be answered. [70]

The Witness: I will give you an example: You can find lots of aircraft in the States that have a very small price on them, for instance, a Cub or anything like that—you can see them advertised in the States for 350 or \$400, but you can't find one on Merrill Field for less than \$1800.

Mr. Manders: No, I am talking of this type.

A. That type of aircraft—there isn't but just a few that was manufactured of the SR9F type with the 450 Pratt and Whitney in it.

Q. Just a few? A. That is right.

Q. What do you mean by a few?

(Testimony of W. O. Epps.)

A. Oh, I would say—I couldn't give you the exact amount, but you won't find very many in Trade-A-Plane.

Q. Well, has this plane been succeeded by larger different models?

A. No, they have different models. They have a SR9C and SR9F, SR10, 18, 19's.

Q. All right now, coming back to this plane, Outside: What could you purchase such a plane as this for on the Outside?

A. At the time we sold it? I would say six or seven thousand dollars. It might not be in as good a shape, because it wouldn't be rebuilt as well as that was. You couldn't find one advertised just rebuilt for that price, I don't believe.

Mr. Manders: Assume it was in its original state—had never been damaged—and let's say had a hundred hours' use—the same type of plane?

A. In the States?

Q. Yes.

A. I would say around 7000.

Q. On the second hand market?

A. That's right.

Mr. Manders: That is all, your Honor.

The Court: Is there any redirect examination?

Mr. Kay: Just one question, your Honor, please.

The Court: Yes.

Redirect Examination

By Mr. Kay:

Q. In response to the last question by Mr. Manders you stated that the value of such a plane in

(Testimony of W. O. Epps.)

the States would be approximately \$7000. Is that the plane in the condition in which this plane was?

A. I wouldn't say it would be in as good a condition, because this was entirely rebuilt, but he said one that had maybe a hundred hours on it. It is according to what kind of material they put in it and what kind of work they did on it. There is a difference there.

Mr. Kay: I believe that's all, your Honor.

The Court: Have the jurors any questions?

Mr. Manders: Let me ask you this question, Mr. Epps:

Recross-Examination

By Mr. Manders:

Q. After this plane was rebuilt by you, had you made use of it? A. Yes, we did.

Q. Did you charter it?

A. We used it in our own business, made a few trips to Fairbanks to see about jobs—rebuild jobs.

Q. And how much had it been used before it had been sold to Mr. McCandless?

A. Oh, the aircraft had about 40 hours on it, I guess.

Mr. Manders: Yes.

The Court: That is all, Mr. Epps—Pardon me, are you through?

Mr. Manders: Just a moment, your Honor. That's all.

The Court: That is all, Mr. Epps. Pardon me; wait a minute.

A Juror: May I ask one question? You said this

(Testimony of W. O. Epps.)

engine had been factory overhauled. Who did this overhaul?

The Court: Pardon me, I didn't hear the question.

A Juror: He stated the motor had been overhauled. I asked who did the overhaul?

The Witness: The Pratt and Whitney Aircraft.

A Juror: Pratt and Whitney?

The Witness: Yes, ma'am. [72]

The Court: That is all. Do you wish to keep this witness here or may he be excused and return to work?

Mr. Kay: As far as we are concerned, he may be excused.

The Court: Have you a telephone at your shop?

The Witness: I have a telephone: Black 725.

The Court: Do counsel for the defendant wish him to stay?

Mr. Davis: Not at this time, your Honor. We may wish to recall him as our own witness.

The Court: You may return to work, then. Another witness may be called.

Mr. Kay: Like to call Paul Kroenung.

PAUL KROENUNG,

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Kroenung, the acoustics in here are very

(Testimony of Paul Kroenung.)

poor, so it will be necessary for you to talk a little louder than you ordinarily do so that all may hear you. Will you state your name, please?

A. Paul Kroenung.

Q. Where do you live, Mr. Kroenung?

A. In the Veterans' housing.

Q. And what is your occupation?

A. We are in the aircraft sales and repair and service work.

Q. Are you one of the owners of the United Air-motive Corporation? A. Yes, sir.

Q. How old are you, Mr. Kroenung?

A. 29.

Q. And how long have you been engaged in the business in which you are now occupied?

A. I have been actively engaged about—almost about three years, and I have been acquainted with aircraft for the last eight years. [73]

Q. Did you attend any specialized school or have any specialized training on aircraft?

A. In the Army.

Q. How long have you been engaged in this business here in Anchorage, Mr. Kroenung?

A. Two years.

Q. Where is the location of your establishment?

A. Merrill Field.

Q. In the course of your business do you keep yourself informed on price and valuation of aircraft, Mr. Kroenung? A. Yes, sir.

Q. Do you sell—deal in aircraft?

A. Yes, sir.

(Testimony of Paul Kroenung.)

Q. Are you familiar with the Stinson SR9F plane owned by C. A. McCandless last summer?

A. Yes, sir.

Q. And was that plane previously owned by you? A. Yes, sir.

Q. Are you fully familiar with the condition of that aircraft at that time, Mr. Kroenung?

A. At what time, sir?

Q. At the time when you sold it to Mr. McCandless? A. Yes, sir.

Q. Will you tell the jury briefly, please, what condition that aircraft was in?

A. Well, the airplane was in practically A-1 shape. It had a new engine in it, and when I say new engine I am referring to a factory majored engine that was majored by the factory. The fuselage and wings were recently recovered and had approximately 20 coats of dope on; it had a semi-gloss finish on it and the inside was newly upholstered. All the instruments were taken out of the ship, checked and were in working order.

Q. Were you generally familiar with that aircraft after the time when you sold it to Mr. McCandless? A. After the time?

Q. Yes.

A. Yes, sir; reasonably so.

Q. Now, from your knowledge of that particular aircraft and from your general business knowledge of prices and conditions at Merrill Field at that time, I wish that you would state your [74] opinion as to the value of that aircraft about September 6, 1947?

(Testimony of Paul Kroenung.)

A. My opinion the price of the aircraft would be \$8500.

Q. And will you tell the jury, please, your reasons for that opinion?

A. Well, that type of aircraft isn't known in the States and it has a larger HP engine than you would find on other Stinsons of the same class, and with the added HP on the engine they have better performance, which would make that aircraft cost more than other similar aircraft of the same make.

Q. What was the cruising speed of that aircraft, if you know?

A. Well, if I remember correctly, at about 10,000 feet it cruised about 150.

Q. And what was the passenger capacity?

A. Five.

Mr. Kay: I believe that's all, Mr. Kroenung. Your witness.

The Court: Counsel for defendant may examine.

Cross-Examination

By Mr. Manders:

Q. Mr. Kroenung, what model airplane was this? A. It was a SR9F.

Q. What is the difference between a SR9F and a SR9E?

A. The SR9E, as I understand it, was a heavier-built airplane, and I am not sure whether it had a 450 in it or not.

Q. SR9G?

A. I really don't know. I mean, when you get

(Testimony of Paul Kroenung.)

in the letter of the SR9 series they may have a different letter on it where there would be only a small difference in the aircraft—maybe another tube put in a wing or some other difference that would have to be looked up in the CAA manuals to find the difference on them.

Q. Is there any difference between those models as to passenger capacity?

A. The heavy wing Stinson, the SR9, was—normally was a three-place airplane, where the 9F was five-place airplane. It depends a lot on each of the individual aircraft of [75] the equipment that was in it. I mean, the model does not necessarily mean the capacity of carrying the passengers.

Q. Well, now, in this airplane you are referring to here—this model F—that had capacity for five?

A. That particular one did. Other SR9F's may not have the capacity for five.

Q. And those five, were they in addition, or did they include the pilot?

A. They include the pilot.

Q. In other words, it is four, then, and the pilot?

A. Yes, sir.

Q. Did I understand you to say that this plane was yours?

A. It was owned by our organization.

Q. It was owned by your organization? Did you do the work on this plane?

A. Yes, sir.

Q. And what frame did you have for it?

A. Beg pardon?

(Testimony of Paul Kroenung.)

Q. The frame—fuselage?

A. I don't understand your question.

Q. Well, what I want to ask you, Mrs. Kroenung, is: Did you buy this plane from some other person? A. We bought it from the CAA.

Q. And what did you pay for it?

Mr. Cuddy: We object, if the Court please, unless it is shown that it was in the same condition as when they sold it.

The Court: No—overruled; you may answer.

Mr. Kay: You may answer that question.

The Witness: We paid 1700 and some odd dollars—I don't remember offhand.

Mr. Manders: To the CAA? A. Yes, sir.

Q. Is that the agency?

A. Yes, sir. I think—I think the airplane came from War Assets, actually. I think the CAA turned it over to War Assets.

Mr. Manders: And when you got that plane was it at that time in flyable condition?

A. No, sir.

Q. What was wrong with it?

A. Well, it didn't have an [76] engine in it, the fabric had to be taken off of it, it wasn't air-worthy and stringers had to be replaced and the interior had to be finished, the instruments had to be taken out and checked, and—well—actually, there wasn't anything left there but the frame. The wings weren't on it.

Q. The frame and instruments?

A. I say, the wings weren't on the fuselage.

(Testimony of Paul Kroenung.)

Q. I understand that, but I understood you to say you took the instruments out and check them?

A. Yes, sir.

Q. Then it did come with instruments?

A. Yes—well, part were in the airplane and part were not in the airplane.

Q. But it was complete with instruments?

A. Yes, sir.

Q. And it did not have a motor?

A. Well, the motor was with it, but it was in a crate.

Q. Then it did come with a motor?

A. Yes, sir.

Q. But it wasn't in place, is that it?

A. That's right, sir.

Mr. Manders: That's all.

The Court: Mr. Kay?

Redirect Examination

By Mr. Kay:

Q. Approximately how long after you purchased that from the War Assets did you and your organization work on that plane, putting it in the condition which it was when you sold it, Mr. Kroenung?

A. Well, I would say it was about five months.

Q. During all of which time your organization was working on that plane off and on?

A. Not continually. It is kind of hard to say, actually, the length of time in a day, but for a month and a half or two months we worked on it continually. After that time we worked on it—well, whenever we could have a part that we needed for

(Testimony of Paul Kroenung.)

the airplane, or have some part checked or something we would take it off and have it checked and then replace it on the airplane—or waiting for parts that we had to [77] put on the airplane.

Q. And what was your statement as to your opinion of the fair value of that plane on September 6?

A. In my opinion the fair value would be 8500.

Mr. Kay: That is all.

The Court: Have the jurors any questions? That is all, Mr. Kroenung. Do you stipulate that this witness may be excused to return to work?

Mr. Davis: Yes, your Honor.

Mr. Kay: Yes, your Honor.

The Court: Will you be available if you are needed again?

The Witness: Yes, sir.

The Court: Very well. Another witness may be called.

Mr. Kay: Plaintiff rests, your Honor.

The Court: Plaintiff rests. Defendants may call a witness.

Mr. Davis: If the Court please, it is now 4:30. I wonder if we could adjourn now and go ahead in the morning. I believe we will be able to put on our proof and have it on by noon, which will leave the afternoon for argument and instructions to the jury.

The Court: All right. I wonder if everybody would be agreeable to coming in at 9:30 tomorrow, so we would be sure to finish the case before late at night? What about the jury? Can you be here

at 9:30 without embarrassment? I know counsel can be—they undoubtedly get up early in the morning. The trial, then, will be continued until 9:30 tomorrow morning.

(The Court then duly admonished the trial jury about discussion of the case, and court was adjourned at 4:30 o'clock p.m.)

On Wednesday, February 25, 1948, at 9:30 o'clock a.m., the following further proceedings were had:

The Court: Roll of the jury may be called. [78]

On Wednesday, the 25th day of February, 1948, and prior to the jury receiving the case for its deliberations and verdict, defendants made a motion for non-suit wherein the following proceedings were had: [79]

(Jurors in the box all present.)

The Court: Are you ready to proceed, Mr. Manders in the absence of Mr. Davis and the defendants?

Mr. Manders: Yes, your Honor. At this time I have several motions I would like to make and ask that the jury be excused for the present.

The Court: Ladies and gentlemen of the jury, you may retire to the jury room until recalled.

(The jury retired.)

The Court: You may proceed, Mr. Manders.

Mr. Manders: If the Court please, in this matter the defendants are making a motion for non suit based on the ground that the plaintiff has failed to prove his case as laid; and further, a motion for a

directed verdict on the ground that the plaintiff has failed to sustain the allegations of his complaint as to the relief demanded and has not at this time shown any conversion of the property referred to in the complaint.

The law seems to be: In the case of *Wm. L. Hughson Co. v. Northwestern Nat. Bank of Portland*, Supreme Court of Oregon, 268 Pac. 756, the general proposition of law is this:

“Disturbance of owner’s possession is gist of ‘trespass,’ while ‘conversion’ is wrongful exercise of ownership in denial of rights of owner.”

Now, that’s the general law of conversion; it is the general law of trespass. There may be a trespassing but it is not a conversion.

And from the case of *Rogers v. Huie*, 56 Am. Dec. 363—it is a California case:

“Conversion is gist of action of Trover, and without conversion, neither possession of the property, negligence, nor misfortune will enable the action to be maintained. [80]

“Trover will not lie unless defendant has converted property to his own use; and if not, then any other act to amount to a conversion must be done with a wrongful intent, either express or implied.”

And the Alaska case, *Davison v. Alaska Banking Co.*, 5 Alaska, 683, I just read from the syllabus, No. 4. This is on Acts of Conversion:

“The bank committed two acts of conversion in this case: First, when the defendant bank first received the property, the evidence shows that it received it for general deposit, and failing to place it

to the credit of the plaintiff was an act of conversion; second, the cashier of the bank gave prior instruction to the bank clerk not to open or deposit the money to plaintiff's credit when received. It was received with instructions to deposit to plaintiff's credit, without notification to the plaintiff that his order would not be obeyed. These acts constituted an act of conversion."

Now there is nothing of that kind in this case at the present time.

On the grounds on which the motions have been made, I move the Court for a judgment of non suit and directed verdict.

Mr. Davis: If the Court please, I would like to concur in the motions of Mr. Manders on behalf of the defendant Dorothy and I submit it without argument on my part.

The Court: The motions are denied and the jury may be recalled.

The minute order denying the motion of defendants for non-suit reads as follows:

"Now came the trial jury who, on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, was resumed.

At this time John E. Manders, of counsel for defendants, moves the Court that the jury be excused pending arguments on points of law; jury excused.

At this time John E. Manders, of counsel for de-

fendants, moves the Court for non-suit on grounds that plaintiff has failed to prove his case as laid; and for a directed verdict on grounds that plaintiff has failed to sustain the allegations of his complaint as to relief demanded and has failed to show conversion of property as claimed in complaint.

Edward V. Davis, of counsel for defendants, concurs in motions in behalf of defendant Don Dorothy.

Motions denied, and the trial jury recalled.

Don Dorothy, being first duly sworn, testified for and in his own behalf.

At 10:35 o'clock a.m. Court duly admonished the trial jury and continued cause to 10:45 o'clock a.m."

(Jury was recalled.)

The Court: Without objection the record will show all members of the jury present. Defendants may call a witness.

Mr. Davis: I would like to call Mr. Don Dorothy.

The Court: Mr. Dorothy may be sworn.

DON DOROTHY

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Davis:

Q. Where do you live, Don?

A. 1030 Third Avenue, Anchorage, Alaska. [82]

Q. How long have you resided in the Territory of Alaska? A. About four years.

Q. By whom are you employed? A. Now?

(Testimony of Don Dorothy.)

Q. Now. A. The Army.

Q. And where were you employed in the early part of September of 1947?

A. Pacific Northern Airlines.

Q. What was your position with Pacific Northern Airlines? A. Pilot.

Q. Will you tell the Court and jury, Mr. Dorothy, what your experience has been in connection with airplanes?

A. Well, I have learned to fly in 1927 and I have been at it most of the time ever since, instructing and planting rice and dusting crops and the selling and ferrying of airplanes; and during the war I was employed by the Army as instructor and as a pilot, towing gliders; and I came up here and went to work for Pacific Northern Airlines, I think it was in 1944.

Q. What type aircraft license do you hold, Mr. Dorothy? A. Commercial.

Q. And what type planes are you entitled to fly?

A. Oh, most anything. I have single engine rating and multi-engine ratings and land and sea.

Q. Does that cover pretty nearly any equipment that flies, Mr. Dorothy?

A. Practically, except for helicopters and things of that nature.

Q. Is your license broad enough to cover flying a Stinson such as is described here? A. It is.

Q. Have you flown such aircraft?

A. Yes, ever since they made them.

Q. In the course of your business with aviation,

(Testimony of Don Dorothy.)

Mr. Dorothy, have you followed the various types of planes and know something about the value of planes?

A. Yes, that's just one of the features of the business. It is just something that you do all the time. [83]

Q. Now then, bringing your attention to the first week in September of 1947, what were you doing for Pacific Northern at that time, Mr. Dorothy?

A. I was flying the inlet run to Kenai, Kasilof, Ninilchik and Homer.

Q. And how often is that run scheduled with Pacific Northern?

A. Three days a week, Tuesday, Thursday and Saturday.

Q. What does it cover? What sort of things are hauled on that run?

A. Well, on Tuesday and Saturday we hauled mail in addition to freight and passengers and their baggage, and the same applied to Thursday except on that day there was no mail.

Q. Did you haul general cargo, then, in addition to property, persons and mail?

A. That's right.

Q. Anything that might be offered to be hauled?

A. That is right.

Q. Now, do you know as to whether or not Pacific Northern is certified for that route?

A. I do know that they are, yes.

Q. How long had you been making that run in the month of September, Mr. Dorothy?

(Testimony of Don Dorothy.)

A. I had been on that run exclusively over three years.

Q. Are you familiar with the various air fields and the various landing places along that route?

A. Yes, every one of them.

Q. Landed on all of them frequently, have you?

A. Yes.

Q. Does that include the beach here in question—the beach where you landed this Stinson?

A. Yes, that beach and other beaches too. There's lots of places where we use beaches.

Q. Had you landed there frequently?

A. Yes, practically every trip, the reason being there is a large cannery about a quarter of a mile from this beach and there is as much business in and out of the cannery as there is in and out of the Village of Kenai. [84]

Q. Tell the jury where the various things are situated at Kenai—the physical set-up there.

A. Well, the village is right at the mouth of the river on the north bank, and the air strip—the south end of the air strip is right up against the village—there's houses right at the end of the runway. And then up the river to the east about a quarter of a mile is the CAA housing site and also another little cannery; and then the river makes a big curve there toward the south again and around that curve a mile or so is this Libby's cannery, and the fact that the river makes this big curve brings the cannery back to within a quarter of a mile of this beach. And this beach—there was some reference made yesterday to

(Testimony of Don Dorothy.)

there being a cliff there. There's no cliff there. At that point it is perfectly flat and there is a road runs from the cannery and you can drive right down on the beach with a truck and the beach is miles long there and it is in better condition than the air field because the tide resurfaces and reconditions it every time it comes in.

Q. Will you describe for the jury the air strip on the Kenai side?

A. Well, it is referred to as sanded gravel, and when the wind blows it is quite dusty and has soft spots in it. They built the field originally with the view to black topping it, but they spent the black top money somewhere else and never surfaced it.

Q. It has gravel surface?

A. Yes, sandy gravel—quite dusty.

Q. How long is the runway on that?

A. 5500 feet.

Q. And what is the surface of the beach?

A. Well, it's what would be referred to as just gravel—not sanded gravel. It's, oh, small size pebbles, big as your little fingernail maybe.

Q. Now, does the beach slope off either way?

A. Yes, it slopes toward the water. Some places down there the beaches [85] are steeper than others and this beach is one of the flatter type. It has quite a little slope to it, but not enough to bother.

Q. How far is it from the air field over to this cannery beach? A. About a mile and a half.

Q. Now, then, Mr. Dorothy, going back to roughly the third of September, 1947, what if any-

(Testimony of Don Dorothy.)

thing did you do concerning your job as pilot for Pacific Northern Airlines that you have just mentioned?

A. Well, on the third of September, that being a day that I wasn't actively engaged in flying—there were other little duties I had—that afternoon I went to see the chief pilot to find out what we were going to use for an airplane for the following days' schedules inasmuch as our Travelaire was broken down and was in the hangar being repaired.

Q. Was the Travelaire the plane that you had been flying on that run?

A. That's the one that I had been flying for the past several years.

Q. And what was that?

A. It was in the hangar being repaired.

Q. All right, go ahead and tell your story.

A. In talking with the chief pilot he suggested that we find an airplane that we could rent for the next few trips, so he instructed me to go out to Merrill Field and look around and see what was available; and I ran into this Stinson owned by Mr. McCandless. However, I didn't know who owned it, so I went into United Airmotive's hangar to ask them, knowing they had owned it at one time, and they told me that Mr. McCandless owned it and where he lived in their trailer court and that he got home about six o'clock. So it was a little after six I went out there and met Mr. McCandless. He was working on his automobile out in the road near his trailer—I guess 30 or 40 feet away from the trailer.

(Testimony of Don Dorothy.)

I waited until he got through with his work and put the hood down and then I told him who I was and what I wanted. I asked him if he was the owner of that Stinson and if it was available for charter, and [86] he said it was and I asked him what his hourly rate was and he said he hadn't established one, or didn't know just what it would be worth and wanted to hear a proposition from me. So I told him if we were to rent a similar aircraft from somebody like Peterson, who has a number of those Stinsons of that general type, that we would pay him about \$35.00 an hour and we would furnish the gas and oil and ground handling and so forth and the liability insurance, which we, of course, already have. And he said well, that sounded like a good deal to him; and I went on to explain to him that the next day being Thursday and there being no mail, we might not make the trip in the event no passengers showed up, but I said we definitely would need it on Saturday because that was mail day—we went, passengers or no. So he said that that was OK and he said I could get the key to the airplane from the boys at United Airmotive. So I said: "OK, then, it's agreed that we will use it tomorrow if the need arises, or Saturday if our Travelaire isn't finished by then," but I was very sure that it wouldn't be.

So then I asked him if he was interested in selling the airplane and he said yes, he wanted \$8500 for it, and I told him that I thought that sounded like too much money for that particular airplane, however, I would like to have our mechanics check it

(Testimony of Don Dorothy.)

over and we make a report to the Seattle office with the recommendation that they buy it, and very possibly the company would make him an offer for it. So he said OK, and I told him that in the event tomorrow—which was Thursday—that I wasn't busy and didn't have to go out and we didn't use the airplane for this flight that I would like it over to our hangar and have the mechanics check it over. And he said that was OK. I believe the expression I used was that I would "fire it up and take it around in our yard." And he said that was OK, and so I told him I would let him know about anything I could hear from the [87] Seattle office about buying the thing. And he said "OK" and with that I left.

And when I got home that evening I called the chief pilot on the phone and told him about the deal that I had made and he said that sounded like a good deal; and that took care of that.

So, let's see, the next thing happened was the following day—I don't know what time of day it was. I think it was in the middle of the day sometime—early afternoon. I went out and I got the key from the boys at United Airmotive and went over and unlocked the airplane and looked it all over and untied it and fired it up, took it around in our yard and had our mechanics check it over; and we established its condition and recommended a price for it, and then I give it a test hop around the field and came back, and I put 20 gallons of gas in it from Jack Carr's pumps and charged it to Pacific Northern, and returned the airplane to its parking spot

(Testimony of Don Dorothy.)

and tied it down and blocked it up and returned the key to United Airmotive.

So then the next day—Friday afternoon quite late I was in United Airmotive's hangar and told them I would need the airplane for the following morning's trip—that's Saturday morning, September 6. And they said: "OK," they said, "you better take the key now because we might not be here as early as you want it" the next morning. So they gave me the key and I went on home.

Next morning, Saturday, I guess it was about 8:15 or 8:20 I got the airplane and took it over in front of Jack Carr's place and we gassed it up completely that time and moved it over in front of our building—Pacific Northern's building—and loaded it full of freight and mail, and about nine o'clock I took off for Kenai.

I arrived at Kenai and unloaded everything that was in the airplane, even including my flight kit which contains a gun and [88] cigarettes and tracer bullets and maps and a few little medical supplies and stuff—weighs about 14 pounds—left that in Kenai because I was going to make a lot of little short ferry trips between this beach and the field. The idea there was a Pacific Northern Airlines Douglas following me and they were to land at Kenai and pick up a couple of passengers for Homer, and those passengers were on Libby's beach so I was to bring those passengers over first and leave them for the Douglas and he would take them on to Homer, and on the way back from Homer he would

(Testimony of Don Dorothy.)

again stop at Kenai and pick up about eight more passengers I was going to ferry over from the beach to the field, and then he could go on home and I would go on with my mail flying down there. However, I took off from Kenai—must have been then about ten o'clock, I would say—and went over, and I flew down this beach without landing once to check the—you know, for any piece of something that might have floated up there that you might not see a mile away, and turned around and landed on the thing. And there's an area there of about 3000 feet that I expected to use, and after landing I taxied the entire length of this area, just checking—you know, for any soft spots or just seeing how this particular airplane operated on that beach, and everything was fine. I turned around and taxied back then clear back to the north end—all landings were made that day south bound because the wind was from the south—taxied clear to the north end and then back to the middle of the strip where the passengers were standing. I guess they began to think I was crazy, taxiing by them all the time. So I stopped and loaded on these two Homer passengers and all their baggage and taxied back to the north end and took off south bound and went over and landed on the Kenai field. And I made a mental note at the time the Kenai field was the one to bear watching because of soft spots, and the beach was much firmer. And I unloaded the passengers and they [89] went over to the side of the field with their baggage to wait for the Douglas.

(Testimony of Don Dorothy.)

And I took off and landed on the beach again within two or three feet of the place I had landed the first time—I could see my wheel marks there—and I rolled along about a hundred feet, and the tail was down and as the airplane slows down and its entire load falls on the wheels, and the wing is of no effective use, it becomes necessary to apply the brake on the low side of the airplane, that is, on the down hill side, because an airplane with a 360 degree full swivel tail wheel, it tends to caster up hill. In other words, the weight of the tail——

Mr. Davis: Now, what do you mean “caster up hill”?

A. I am just coming to that. The weight of the tail and the fact that the tail wheel is not controlled from the rudder lets the tail wheel slide down hill. It is going down the beach straight ahead, but it also wants to follow the line of least resistance which, like water does, it goes down hill. So it becomes necessary to hold the airplane in a straight path with the use of, in this case, the right hand brake because the right hand side of the airplane is on the low side. And the brake was effective for, or, I guess about a hundred feet, and as I increased the pressure on the brake, why, pretty quick the right wheel dug in and I thought that I hit a soft spot, and so that—the fact that the right wheel dug in turned the airplane about 30 degrees to the right and I was still rolling, oh, probably 50 miles an hour, and before anything could be done about it I was out into the mud—you know, where the sloping

(Testimony of Don Dorothy.)

beach ends and the mud flats begin. Of course, the tide was out and the water was out another hundred feet or so. And the minute I hit the mud over on her back she went. I was banged up a little, nothing very serious, and I got out and grabbed out of the airplane what I could get out, [90] which was nothing but a cushion and the head set and the microphone, and I had difficulty in walking—I got a smack on the leg—and a bunch of passengers standing there come running down. And I had to walk out on the wing out to the gravel because the entire airplane was lying in the mud and I don't think the mud there will support the weight of a person. Then I went back up and looked at the place where the wheel dug in and there seemed to be kind of a mound of gravel there—soft gravel. And I didn't know until the salvage crew went down there that the brake had locked, because the airplane was upside down and the wheels sticking up in the air, and at no time did the tide ever come up high enough to cover the wheels—just barely came up high enough to cover the fuselage itself. But when the salvage crew went down a few days later to look——

Mr. Kay: We object to any testimony concerning what the salvage crew found, unless it is to his own knowledge.

The Court: Objection is sustained.

Mr. Davis: Were you down there with the salvage crew?

A. No, I wasn't.

Q. All right, then, you shouldn't testify to it.

A. Anyway, I went back and looked at this soft

(Testimony of Don Dorothy.)

mass and the wheel had made a trough there—a track in the gravel about six inches deep. So Libby's had a truck, then, and they took me over to their cannery and we got a boat and went back to the Kenai field and boarded the Douglas when it was north bound and came back to Anchorage and made a report on it.

Q. Now, Mr. Dorothy, referring back to the conversation you had with Mr. McCandless, was the little girl who testified yesterday—was she present during that conversation? A. No, she wasn't.

Q. Was she where she could have heard the conversation?

A. I don't think so, because it was 30 or 40 feet between where the [91] car was parked and the trailer.

Q. At the time you left that conversation did you consider that you had made a deal with Mr. McCandless to rent that airplane?

Mr. Kay: I object to that question. It calls for a conclusion of the witness. The facts speak for themselves—what was said.

The Court: Objection is sustained.

Mr. Davis: Mr. Dorothy, did Mr. McCandless ever have any conversation with you after that time prior to the crash?

A. Not prior to the crash.

Q. Did he ever do anything to indicate to you you should not go ahead and make use of the plane?

A. No.

(Testimony of Don Dorothy.)

Mr. Kay: Object to that unless the witness knows.

The Court: Overruled.

Mr. Davis: Did Mr. McCandless get in touch with you at all about not taking that plane after you had this conversation with him?

A. No, not at all. As far as I was concerned the deal was——

The Court: Never mind, you need not state your own conclusions, Mr. Dorothy. Just answer the question.

The Witness: What was the question, now?

Mr. Davis: I want to know whether or not Mr. McCandless, after your conversation on September 3 did anything—talked to you in any way—to indicate to you that you shouldn't take that plane?

A. No, not at all. The deal was finished—it was all consummated, so far as I was concerned.

Mr. Kay: Your Honor, I think the witness is violating the injunction which you just placed upon him.

The Court: The witness has violated it. Does counsel object?

Mr. Kay: I would like to have that remark stricken from the record.

The Court: The remark may be stricken and the jury is instructed to disregard it. [92]

Mr. Davis: Would you specify what should be stricken, your Honor?

The Court: "The deal was consummated so far as I was concerned." He was asked a question as to

(Testimony of Don Dorothy.)

whether Mr. McCandless did or said anything to indicate anything else and he said "no." And then he continued by saying "it was a closed deal so far as I was concerned." That remark was his own conclusion and may be stricken.

Mr. Davis: Thank you, sir. Now, go down to the time after the accident, Mr. Dorothy, and tell the Court and the jury what you did after you returned to Anchorage?

A. Well, let's see: That afternoon I went out to—in company with another Pacific Northern Airlines official. I went out to Mr. McCandless' trailer and hoping to catch him home, being it was Saturday afternoon, but he wasn't there, and I told his daughter—the little girl that was on the stand yesterday—that we had had an accident with the airplane and for Mr. McCandless to get in touch with the firm's attorney, which was Mr. Manders. And she said that she would tell him. I believe I told her that the airplane was upside down in the mud flats down by the beach at Libby's. And I went on home and I went to bed quite early because I had a smash in the chest and my leg hurt, and that night about—I think it was 10 or 11 o'clock—quite late after I was asleep, Mr. McCandless called up and talked to my wife, but my wife wouldn't get me up.—

Mr. Cuddy: Wait a minute: We object, if the Court please, what his wife said.

Mr. Davis: He didn't say anything about what his wife said.

Mr. Cuddy: He started to.

(Testimony of Don Dorothy.)

Mr. McKay: He started to testify about a conversation between his wife and Mr. McCandless. [93]

Mr. Davis: Your Honor, there wasn't any such thing.

The Court: Overruled. Do not repeat any conversation your wife had with Mr. McCandless.

The Witness: No.

Mr. Davis: Go ahead, Don.

A. So I didn't know about this telephone call until the next morning, and it was quite early—or about nine o'clock. Mr. McCandless called again and that time—that occasion I talked to him. And I asked him what this business was I heard about he claimed I took the airplane without his permission; and he said that was correct, and we haggled back and forth and he said he had told the United Airmotive boys not to give me the key any more after I had test flown it on Thursday, and I asked him why they gave me the key and he said he didn't know. And I could hear some voices in the background. And I asked him if he was in United's hangar and he said he was. And I said: "Let me talk to Woody," so he put Woody Epps on the phone and he told me he didn't know anything about this not giving me the key business. He didn't know anything about that. I told Mr. McCandless his quarrel wasn't with me, but it was with Pacific Northern and I would recommend he go to see Mr. Manders and see if they could come to some settlement. After all, I just worked there and it wasn't any of my affair. So I guess that was the end of that

(Testimony of Don Dorothy.)

conversation and I never talked to him again until the time he refers to in the restaurant. We had quite a little conversation there.

Q. Was that conversation in the restaurant before or after this suit was brought, Don, or do you know?

A. Well, I don't know. It was six weeks or a couple of months, I would say, afterwards. I don't know whether the suit was filed yet or not.

Q. Did Mr. McCandless ever make a demand on you personally for \$8500?

A. No, he never did except that Sunday morning when [94] he was talking on the phone he said he was looking for a check for \$8500, and I told him I was sorry I couldn't supply him with a check for that amount, and I again referred him to Mr. Manders.

Q. Did you at any time, Mr. Dorothy, assert ownership over this plane? Did you ever claim that the plane was yours? A. Why, no.

Mr. Kay: Object to the question, your Honor. It is obviously calling for legal conclusion.

The Court: Objection is sustained.

Mr. Davis: Your Honor, I don't understand the objection or the ruling of the Court. I asked him if he had ever asserted ownership of the plane. That doesn't call for a conclusion.

The Court: He can tell what he did and said. If he claims it as being his that is his own mental conclusion.

Mr. Davis: Well, Mr. Dorothy, did you say any-

(Testimony of Don Dorothy.)

thing to anybody or do anything to show that plane was yours? A. Why, no.

Q. Mr. Dorothy, did you say that you took that plane over to Pacific Northern's hangar and had it gone over by mechanics?

A. They checked it over, yes—looked at the fabric and the airplane's general condition and the finish. We listened to the engine, checked the magnetos, pulled the——

Q. Do you know what value was put on that plane at that time by the mechanics?

Mr. Cuddy: Object, if the Court please.

Mr. Kay: He can state his own opinion.

Mr. Davis: I will ask his opinion.

The Court: He may state his own opinion.

Mr. Davis: What was the value, in your opinion, on September 3, 1947?

A. Your Honor, may I state what opinion we as a group came to?

The Court: I think you can state your own reasons and then state the reasoning by which you arrive at that opinion, but [95] your own opinion is what you may testify to. You may arrive at that opinion through a variety of sources of information or circumstances.

The Witness: Well, on the basis of its—well, how would you say it—of its value in the States, or its replaceable value—its market value, plus the cost of getting it to Alaska—my conclusion it was worth—

Mr. Cuddy: Wait a moment. Didn't we rule on

(Testimony of Don Dorothy.)

it before he had to state the value of the plane in the area where located?

The Court: He is arriving at it.

The Witness: I am arriving at it now. \$5500.

Mr. Davis: Now, will you go farther and tell the Court and jury how you arrived at that being the value of that particular plane?

A. Well, by its replaceable cost—the cost of replacing it—on the basis of advertisements in the trade journals, planes for sale.

Q. Is that based on the value of a similar plane in the area here in Anchorage, Alaska?

A. No, all the trade journals are published Outside, so to that you have to add the cost of getting the airplane up here.

Q. Now, when you talk about \$5500 as being the value of this plane on September 6, is that the value of a similar plane to this one in Anchorage, Alaska—that \$5500?

A. That is right.

Q. In the area here?

A. That is right.

Q. Mr. Dorothy, is there anything that I have overlooked that the Court and jury should know about this case that you should tell them?

Mr. Kay: Your Honor, that seems to me to be a search-all question which is clearly objectionable.

The Court: Well, he may suggest some subject that has not been testified to. You may answer. [96]

The Witness: Well, at the moment I don't think think of anything.

Mr. Davis: Excuse me one minute, your Honor. (Conferring with Mr. Manders.) Your witness.

(Testimony of Don Dorothy.)

Cross-Examination

By Mr. Kay:

Q. Mr. Dorothy, I think you testified that for approximately two or three years before the time of this accident you had been flying the inlet run for Pacific Northern Airlines? A. That's correct.

Q. And in that flying I believe you testified that you have been using a Travelaire?

A. That is correct.

Q. Would you describe that Travelaire plane to the jury, Don?

A. Yes, it is the same general type as this Stinson. They are referred to as high-wing monoplanes and the pilot sits up forward on the left hand side and the passenger may sit beside him. And in the case of the Travelaire there's two rows of two seats each behind the pilot—makes the total of a six-place airplane. And then there's a large baggage compartment and mail space behind that; and the cabin is entered from the rear.

Q. What, if you know, Don, is the cruising speed of that Travelaire?

A. It is about a hundred and five.

Q. 105 miles an hour? And at what speed does the Travelaire land, Don? A. Oh, about 60.

Q. Lands as fast as 60 miles an hour?

A. Yes, if there is anything in it. Of course, if it's empty it will land slower.

Q. How slow would it land if it were empty?

A. With no wind? About 50.

Q. And describe the tires on the Travelaire, will you, Don?

(Testimony of Don Dorothy.)

A. They are large doughnut balloons—just the size I don't know, but they are about that big around. (Demonstrating.)

Q. How wide are they, would you say?

A. 12 or 14 inches.

Q. What type of brake does the Travelaire have on it, do [97] you know?

A. It has got an internal tubular expanding Goodyear brake.

Q. An internal expanding Goodyear brake?

A. Yes, there is a tube in there about six inches in diameter and about a foot long in the hub that expands against the hub, actuates it.

Q. How is that brake operated by the pilot?

A. With the toe brake.

Q. Pressure of the toe you operate the brake?

A. Yes.

Q. Is there an independent brake for each wheel?

A. That is right.

Q. And you operate the brake by pressure of the toe of the respective foot? A. That is right.

Q. Now, turning to the Stinson airplane, Don, how fast does this airplane which you were flying on September 6—how fast does that cruise?

A. Cruise?

Q. Uh-huh?

A. Oh, if you worked at the altitude I flew, at about 2,000 feet, and with a reasonable amount of power, it moves about 120. If you worked more power it would cruise 140 or so. In higher altitude—what

(Testimony of Don Dorothy.)

is known as optimum altitude—it might cruise faster than that.

Q. How fast does that plane land?

A. Well, it lands at about 60 also because it is equipped with flaps.

Q. Don, isn't it a matter of fact that that plane lands at about 70 to 75 miles per hour?

A. No, not unless you made a wheel landing—you know, landed on just the two front wheels and let the tail settle—but with flaps it will land just about 60.

Q. Isn't it a matter of fact that if you landed that plane at as slow a speed as 60 miles an hour you would be in danger of a crash by reason of the low speed—stall out? A. Why, no.

Q. In other words, it is your testimony that it lands at about 60 miles an hour?

A. That's when the wing, with the flaps [98] down, ceases to become effective enough to hold the airplane off the ground.

Q. Now, what size of a tire does that plane have on it, Don?

A. It has got a Maller tire. I don't know the size of it, either, but it is about—oh—seven inches in diameter.

Q. It is about half the size, then, of the Travelaire type? A. That's about right.

Q. And how does—what kind of brake, if you know, does the Stinson have on it, Don?

A. It has a Goodyear disk brake—hydraulic—hydraulically operated.

Q. A Goodyear hydraulic disk brake?

(Testimony of Don Dorothy.)

A. Pardon me, Goodrich.

Q. Hydraulic disk brake?

A. I am not too positive it's Goodrich made it, but I am reasonably sure it is a Goodrich disk brake. I know it is hydraulically operated.

Q. How does that brake operate by the pilot?

A. On that airplane it has large pedals down there just the shape of your feet and you operate the brakes on it with your heels.

Q. In other words, the brakes on this airplane operate just the opposite of the brakes on the Travelaire?

A. That is correct.

Q. The Travelaire has a toe brake, operated by your toe; the Stinson has a heel brake operated by your heel?

A. That's right.

Q. And how long had you flown the Travelaire previous to this accident?

A. Three years. This particular Travelaire was in service a little over two years, but we had another one just like it before that.

Q. Now, how often had you flown this particular Stinson, Don, at the time of the accident?

A. How often?

Q. How many takeoffs and landings had you made?

A. I made one—well, I don't know on that Thursday whether I made one or two, but I believe only one. That would be one landing and takeoff. Well, we'll just count the landings. It's a cinch if there was a landing there must have been a takeoff.

Q. Right.

A. All right. There was one Thursday and there

(Testimony of Don Dorothy.)

[99] was one at Kenai on the field and there was one on the beach, and there was one back to Kenai and then there was one back at the beach.

Q. In other words, the accident occurred on the fifth landing? A. On the fifth.

Q. Now, Don, did you have any difficulty in adjusting yourself to the fact that you had been flying a plane with a toe brake for the three years and now you were flying one with a heel brake?

A. No, you are never conscious, hardly, of whether you have heel or toe brakes, because it is just like an airplane with a stick or a wheel. If you can fly you can operate either type.

Q. Now, on the Stinson, if you used your toe you steered the plane with a rudder, didn't you?

A. Well, yes, but if you tried to apply the brake with your toe you would get nothing, so you would immediately change over and use your heel.

Q. So, when you pushed with your toe in the Stinson you would steer the airplane using the rudder?

A. No, you would not, for this reason: That when you push with your toe in the Stinson, you wouldn't get anything because you are holding the right pedal from going down because the other pedal would want to come up and your other foot is on it. That's the reason you can't confuse the rudder with the brakes. But now, in the case of the brakes, both pedals can go down at once, or one can go down at a time, but in the case of the rudder if one goes forward the other rudder has got to come back.

(Testimony of Don Dorothy.)

Q. In other words, if you pushed on the left the right foot would come back?

A. Yes, if you let it. But you wouldn't let it if you are working for a brake action.

Q. Yes, but when coming in with a landing you are guiding it with a rudder? A. That is right.

Q. You are guiding it for a landing using the rudder? A. Yes.

Q. So, in guiding this Stinson you would be guiding the plane with your toe, with the rudder?

A. That's right.

Q. Now, as you come in for a landing it is necessary to guide the plane rather carefully, isn't it, and continually? A. That's right.

Q. So that when you came in for this landing on the beach down there your toes were working pretty fast, you might say, on that rudder?

A. Uh-huh.

Q. Now, isn't the logical method of steering an airplane, Don, by means of the rudder?

A. That is right, but when you are landing you are continually decelerating, in other words slowing down, and then there comes a time when the rudder is no longer effective—it takes air speed to make it effective—and then you change over to your brakes and forget about the rudder from there on in.

Q. Now, at 60 miles an hour you were traveling a mile a minute, correct? A. That's right.

Q. You were traveling, in other words, 5,280 feet a minute? A. Right.

Q. And you testified that you applied the brake, I believe, at about a hundred feet after you touched

(Testimony of Don Dorothy.)

the beach, is that right?

A. I would say that is correct, yes. I was holding it with the rudder.

Q. On direct testimony you stated you applied the brake at about a hundred feet, right?

A. Yes.

Q. In other words, you had been on the beach about $11\frac{1}{4}$ second at the time you applied the brakes, correct?

A. That would be about correct, yes.

Q. Now, in that $11\frac{1}{4}$ second you were torquing it to—[101] holding with the rudder—steering the plane, were you not?

A. Yes, and also a little outside aileron, too.

Q. And if the plane started to drift up the beach, as you testified that it did, wouldn't it be logical to steer with the right rudder—steer it back down—hold it in a straight line down the beach?

A. Yes, but you must remember a Stinson or any other airplane with flaps in the top wing—and in this case the Stinson only has a top wing—the flaps do quite an effective job of braking without the rudder and it is very ineffective after you are once on the ground with the flaps down. For that reason, as soon as we are three points on the ground it is always good policy to put your flaps back up because it makes the tail heavier and causes the tail to stay down better. Which I did—I had already dumped the flaps before I used the brakes.

Q. Now, during this $11\frac{1}{4}$ second when the plane started to drift up the beach, you bore down with your heel, did you not?

(Testimony of Don Dorothy.)

A. Let me correct you on that: The plane never started to drift.

Q. Started to turn?

A. No, it never started to turn. I was applying the brake to keep it straight.

Q. In other words, you were anticipating, as a good pilot would, is that it? A. That is right.

Q. So you pressed down with your heels?

A. I kept a little right brake on, sure.

Q. You pressed down with your heel?

A. That is right.

Q. Now, isn't it a matter of fact, Don, when you pressed down with your heel you anticipated you would be steering that plane with the rudder?

A. Why, no.

Q. Isn't it a matter of fact, Don, you had been flying this Travelaire so long that when you bore down with your heel, as you would in the Travelaire, you thought you would be steering the plane with the rudder?

A. No, I knew definitely I would be applying the brake. [102]

Q. And isn't it a matter of fact that with the narrow tires it would be an extremely inadvisable thing for you to do to jam on the brake 100 feet—only 1¼ second after touching the beach?

A. I never jammed on the brakes.

Q. You just testified you applied pressure sufficient to cause the tire to dig into the beach—you testified there was a mound of gravel, isn't that correct?

A. Yes, the mound of gravel was made by the wheel digging into the gravel.

(Testimony of Don Dorothy.)

Q. Digging into the gravel, right?

The Court: Well, let the witness answer.

Mr. Kay: And that was because of this heel pressure that you had applied in the plane?

A. No, it was because the brake never did release—the pressure built up.

Q. Now, Don, about that point: Have you examined the right wheel on that Stinson since the time of the accident?

A. I looked at it day before yesterday.

Q. Did you remove that wheel from the plane?

A. No, I didn't, of course not, but the salvage crew had to disconnect the brake line, the pipe that goes to the wheel, to get the brake to release after they turned it over.

Q. Did you examine that? Of your own knowledge, do you know that? A. Yes, sure.

Q. You were there when the salvage crew did that?

A. No, they told me they did that.

Q. They told you. but you don't know of your own knowledge?

A. And I went and inspected the plane and pipe line and it is still disconnected.

Q. Has the wheel ever been removed that you know of? A. That I couldn't say.

Q. As a matter of fact, it is sitting out there with the cotter pins still in it, behind the Pacific Northern hangar, isn't it?

A. I don't know about the cotter pin, but it is sitting [103] behind the hangar.

Q. With the wheels still on the plane?

A. With the wheel still on the plane.

(Testimony of Don Dorothy.)

Q. Now, wouldn't it be logical, if you were going to contend that brake locked, to remove the wheel and——

Mr. Davis: Your Honor, I have let this go on a long while, but he is now asking for a conclusion of the witness—he stopped me awhile ago. It is entirely immaterial and incompetent and I think it should be stopped at this time.

The Court: It is a matter of argument. Objection is sustained.

Mr. Kay: But you never have removed the wheel from the plane? A. No, that isn't my job.

Q. Now, turning to the afternoon of September 3, Don, you stated that you went out to the trailer court and introduced yourself to Mr. McCandless, I believe. A. That's right.

Q. And that he was working on his car?

A. That's right.

Q. Now, where was his car situated, if you can recall, with regard to the nearest trailer?

A. Well, there is a U-shaped road runs through the place—quite a wide road—and he was parked in this—to the side of this road—I think 30 or 40 feet from the trailer where he lived.

Q. It is your testimony that his car was 30 or 40 feet from the nearest trailer?

A. That is to the best of my recollection, yes.

Q. Now, isn't it a fact that there is a trailer parking space beside each trailer at that trailer court, approximately, the parking space about eight feet from the trailer, Don?

A. Well, I think most people park beside their

(Testimony of Don Dorothy.)

trailer—between theirs and the next one—but that isn't where his was that time.

Q. It isn't a fact his car was in parking space about eight feet from the trailer?

A. No, it was out in front of the [104] trailer—I mean the end that you pull.

Q. Now, I believe you testified that the first matter that you brought up with Mr. McCandless was the question of chartering the plane or hiring the plane?

A. That is right.

Q. Isn't it a matter of fact, Don, that you first discussed with him the question of purchasing the plane?

A. No, I talked about renting first. That was my instructions and that's what I was interested in, was chartering an airplane.

Q. Did you introduce yourself to Mr. McCandless as the chief pilot for Pacific Northern Airlines?

A. No, I did not. I said I was a pilot.

Q. A pilot for Pacific Northern?

A. Yes. It was the chief pilot that sent me to see him.

Q. And you, I believe, testified that you suggested to him a charter or hire contract at \$35.00 per hour?

A. Uh-huh.

Q. Gas, oil, maintenance and liability insurance, is that correct?

A. Uh-huh.

Q. That states it?

A. Yes; the liability insurance applies to the passengers and the freight and the mail, and if the airplane goes down some place this insurance pays for getting them out.

(Testimony of Don Dorothy.)

Q. Now, you stated that, at one point in your testimony there, that you would get in touch with your Seattle office. What was that in regard to?

A. That was in regard to buying the airplane. Our staff here would look it over and make a recommendation that the Seattle office buy it at a certain price.

Q. And didn't that also apply, as a matter of fact, to the provision for chartering the airplane?

A. No, we had the authority to charter an airplane right here.

Q. Well now, did you discuss the fact with Mr. McCandless that Mr. Woodley might be in town that week end.

A. I never mentioned Mr. Woodley's name.

Q. You never mentioned it at all during that conversation? [105] A. Not at all.

Q. Didn't refer to the fact that he would be in town that week end?

A. No, I didn't say he was coming in. I don't think he has been up here since the accident.

Q. He, as a matter of fact, did not come in town that week end, is that right?

A. As far as I know he did not, no.

Q. You don't know whether he did?

A. No, I don't know for sure, but I think if he had been here I would have known it.

Q. I believe you testified that you are employed by the Army now, Don? A. That is right.

Q. Approximately how long have you been employed by the Army?

A. Since the fourth of February.

(Testimony of Don Dorothy.)

Q. When did you terminate your work with Pacific Northern Airlines?

A. September 15 last year.

Q. Now, after the accident, how long did you remain at the scene of the accident, Don?

A. Oh, I think about 30 minutes.

Q. And then you took a dory or boat over to across the river?

A. Yes. There was—these men that were there that I was to pick up were Libby-McNeil and Libby officials—one of them the cannery superintendent. I conferring with them there on the beach a while about how we could get the airplane back on its feet and get it up high and dry, and we had quite a consultation about it and decided it couldn't be done before the tide came in and did its damage because all gear and equipment and everything was all greased up and put away for the winter. There was no trucks or tractors available or anything: That is, that you could get on the spot before the tide came in.

Q. Where was the tide at that time?

A. The tide was out at the time of the accident, which was about 10:30 or something like that in the morning, but it was due in in the afternoon about two.

Q. Now Don, do you recall who your passengers were on the [106] first trip that you made off the beach there?

A. There was—it was a man and a lady going to Homer. They are residents down there, but I don't remember their names.

(Testimony of Don Dorothy.)

Q. Would their names be Sam Bell and Frances Pabeloff, do you recall?

A. Oh, let me see—I know Sam Bell; I believe it was.

Q. It was Sam Bell and it might have been Frances Pabeloff?

A. Yes, it was a lady.

Q. Now, did you have any discussion with them during the flight there—conversation at all?

A. Oh, if I did I don't recall what it was.

Q. Did you have any conversation after you landed?

A. At Kenai? I might have made a mention that the Kenai field was softer for these small wheels than the beach was, I believe——

Q. Are you sure that was the Kenai field you were talking about, Don?

A. Yes, I made this mental note the first time I landed there, and when I came in the second time with this Bell and whoever the lady was I made another mental note and I might have said out loud to them that the Kenai field was worse than the beach.

Q. Now, as a matter of fact, Don, weren't you talking about the beach? Didn't you tell Sam Bell and Frances Pabeloff that the beach was tricky and that you didn't like it?

A. No.

Q. You didn't make that remark?

A. If I did, I don't remember it.

Q. You don't recall whether you made that remark or not?

A. That is right.

Q. You might have made it?

A. Well, no, I would be sure that I haven't—that

(Testimony of Don Dorothy.)

I didn't say it—because if I would have said it I think I would have remembered it.

Q. Now, Don, referring to the brake on the plane again: Would the brake lock or grab, as you described it? Would it be [107] fair to say that the brake seized? Is that the technical word for it?

A. Well, that would practically require the use of a dictionary to figure out just what these terms mean—locked and seized.

Q. Have you ever heard the term “seized” used to apply to brakes? A. Yes.

The Court: What did you say, no?

The Witness: Yes.

The Court: Oh, you said yes?

Mr. Kay: And would a seized brake show signs of over-heating? A. I believe it would, yes.

Q. And in other words, if the brake seized on this plane it would show signs of over-heating, is that your testimony?

A. Well, you are asking me for an opinion?

Q. That is right, you are an expert.

A. In the first place, I don't think the brake seized for this reason: That five days later when the airplane was turned over it could not be moved—that is, with the wheels rotating—until they disconnected the brake pipe that carries the fluid under pressure to the wheel, and when they took that off that allowed the pressure to run out, so the trouble was in the piston—in the brake cylinder.

Q. Well, if the trouble was in the piston, then, assuming that there was any trouble, that it stopped

(Testimony of Don Dorothy.)

the wheel, wouldn't the disk show signs of over heating? A. Not necessarily.

Q. Not necessarily?

A. They wouldn't over heat in a hundred feet or so.

The Court: Court will stand in recess until 10:45.

(Whereupon recess was had at 10:35 o'clock a.m.)

After Recess

The Court: Without objection the record will show all members of the jury present.

And counsel may proceed with examination.

Mr. Kay: Thank you, your Honor. Just a few more questions, Don: You testified in your opinion this aircraft was of a value [108] on September 6 of about \$5,500?

A. That would be my estimate of its replaceable value.

Q. Do you recall what your estimate of its value was at the time you filed your answer in this action?

A. I believe I said less than \$6,000.

Q. You said less than \$6,000 in your answer?

A. Uh-huh; that's just a general answer.

Q. Now, in arriving at that figure, Don, you keep yourself informed on the prices of airplanes generally? A. I do, in trade journals, yes.

Q. You do consult the trade journals? Do you read Trade-A-Plane? A. Yes.

Q. Do you recall any Stinson SR9F of a similar type being priced in Trade-A-Plane?

(Testimony of Don Dorothy.)

A. Yes, I saw one the other day.

Q. Did you see any priced in the Trade-A-Planes during 1947?

A. I don't recall whether I saw a SR9F during '47 or not. This one that I saw was—I think was in a December issue of '47, though.

Q. Just to refresh your recollection, Don, I will ask you if you read that particular Trade-A-Plane item marked there. (Handed paper to the witness.)

A. No, I never saw this one. It's apparently a similar aircraft, though.

Q. Very similar aircraft, and what was the price stated in Trade-A-Plane?

A. You mean—that isn't Trade-A-Plane, is it?

Q. I believe that is Trade-A-Plane.

A. Yes, I guess it is. 9,500 that says.

Q. And that is a similar type of airplane?

A. Yes, but you must remember this: There are a lot of people own airplanes that just think they want to sell them. They put some fantastic price on them.

Q. But that is the price stated in that?

A. In that particular Trade-A-Plane, yes. [109]

Mr. Manders: Let me see that, please?

Mr. Kay: Certainly. (Handed paper to Mr. Manders.) Now, just to refresh your recollection—

Mr. Davis: Just one minute. (Examining paper with Mr. Manders.)

Mr. Kay: I hadn't planned to use that in evidence, but if you would like to have me I would be glad to identify it.

Mr. Davis: You might ask him the date on that.

(Testimony of Don Dorothy.)

Mr. Kay: Certainly. The date on this particular Trade-A-Plane, Don, will you state that?

A. That is the second issue of February, 1947. There has been a terrific drop since then.

Mr. Manders: Mr. Kay, is the entire paper there.

Mr. Kay: I don't know, Mr. Manders. It appears to be a sheet.

Mr. Manders: Let me see it. (Mr. Kay handed to him.)

The Court: Counsel may proceed.

Mr. Kay: I was going to ask that that be marked as Plaintiff's Exhibit 1 for identification.

The Court: It may be so marked.

(Plaintiff's Exhibit No. 1 marked for identification.)

Mr. Kay: I will ask you if Trade-A-Plane is a commonly used journal of prices trading in airplanes?

A. It is the largest and, I believe, the most common and authentic.

Q. And does this sheet appear to be a sheet of the second issue of February, 1947, Trade-A-Plane?

A. It does. At that time they were using white paper. They are back to yellow now.

Q. Now, I ask that Plaintiff's Exhibit I for identification be introduced in evidence as Plaintiff's Exhibit 1.

The Court: It may be shown to counsel for defendant.

(Testimony of Don Dorothy.)

(Mr. Kay again handed paper to Mr. Manders.)

Mr. Manders: This ground, your Honor: That it go in for the purpose of showing an offering price only.

The Court: Well, is there objection? [110]

Mr. Manders: There is objection to it excepting that it go in for that one purpose. It isn't the sale price of airplanes,——

Mr. Kay: All we are offering it for——

Mr. Manders: Just a moment—for the reasonable value. This is a trade journal of offerings.

Mr. Kay: That is right.

The Court: If there is no objection it may be admitted for a limited purpose.

Mr. Manders: All right.

The Court: As Plaintiff's Exhibit No. 1.

(Plaintiff's Exhibit No. 1 admitted in evidence.)

Mr. Kay: It is admitted, then, your Honor?

The Court: Yes, to show the offering prices only.

Mr. Cuddy: Your Honor, very technically I believe an exhibit must be read to the jury. Will counsel stipulate that only that one particular ad referring to the Stinson need be read?

Mr. Davis: We will waive reading even that one ad.

Mr. Kay: Well, I would like to read that one ad.

The Court: You may read that one part to which

(Testimony of Don Dorothy.)

you have made reference. The rest of it may be considered without being read, as I understand.

Mr. Kay: Yes, sir. The particular ad in reference in the February issue of Trade-A-Plane:

“For Sale or Trade: SR-9F Stinson, 450 Wasp Jr. Cruises 150, 5 passengers, new cover, 3 band receiver 3105-6210 transmitter, rust brown leather and pleated covert cloth upholstery, flares, relicensed, day, night, and instrument. Will deliver anywhere for expenses. This beautiful high performance ship, \$9500. George D. Mace, Jr., Box 696, Procnix, Arizona.”

Mr. Manders: Just a minute——

The Witness: There's a possible witness.

The Court: What is it? [111]

The Witness: I saw a possible witness.

Mr. Manders: I have a witness here and I didn't want him in the court room.

The Court: All right.

Mr. Kay: And I believe you stated that the description of the plane which I have just read from the Trade-A-Plane is substantially similar to the plane involved in this case?

A. It seems to be, yes.

Q. I will ask to have this marked as Plaintiff's Exhibit 2 for identification (handing paper to clerk).

(Plaintiff's Exhibit 2 marked for identification.)

Mr. Kay: I will show you, Mr. Dorothy, Plain-

(Testimony of Don Dorothy.)

tiff's Exhibit 2 for identification and ask you to state what it is, please?

A. It is the Trade-A-Plane sheet for the third issue of March, 1947.

Q. And show you the item marked in ink there and ask you what that refers to?

A. This is a different model, however. This has a 350 Wright engine instead of a 450 Pratt and Whitney. Want me to read it?

Mr. Kay: Please.

A. (Reading):

"Stinson SR-9 Reliant, seaplane and landplane, 350 Wright factory job, brand new floats, deluxe model, never been in water, ship on wheels now, complete instruments, 2 radios, transmitter, loop, mooring light, beautiful ship. \$8900, will accept trades, can finance. Leeward Aeronautical Co., Airport, Pittsburgh, Pa., or Vandergrift, Airport, Penna."

However, that includes floats at \$8900.

Q. All right (handed paper to Mr. Manders).

Mr. Manders: The same objection, that it be limited for the one purpose, as to the other, your Honor.

The Court: You have no objection otherwise? It may be admitted for the limited purpose of showing offering price only.

(Plaintiff's Exhibit No. 2 admitted in evidence.) [112]

Mr. Kay: In reference to that last plane, Mr.

(Testimony of Don Dorothy.)

Dorothy, would the fact that it only had a 350 HP motor make it of less value than if it had a 450 Pratt and Whitney?

A. Well, it is a matter of choice. However, most people prefer the Pratt and Whitney engine to the Wright.

Q. Isn't the value more—the price, market value, more?

A. With the Pratt and Whitney in it?

Q. Yes.

A. They cost more originally new, but they are not necessarily worth any more in a used condition because they are more expensive to operate and lots of people don't want them—the Pratt and Whitney—for that reason.

Mr. Kay: That is all.

The Court: Is there any redirect examination?

Redirect Examination

By Mr. Manders:

Q. Mr. Dorothy, during the time that you were flying for Pacific Northern on the Anchorage-Kenai-Homer run, how frequently did you have occasion to, or did you, land on the beach by the cannery across from Kenai?

A. Oh, I landed there nearly every trip.

Q. And how many trips would you say that you made a week, on that run?

A. Oh, when everything was normal it was three trips a week, but during the rush periods, why, there's sometimes three trips a day.

(Testimony of Don Dorothy.)

Q. And that was during a period of approximately three years?

A. It was more than three years.

Q. Now, did you leave the Pacific Northern of your own account? A. I did.

Q. And who were you employed by then?

A. I went to work for Alaska Airlines as a pilot.

Q. As a pilot? A. That's right.

Q. And what type of planes did you fly for Alaska Airlines? [113]

A. AT-19's—Stinsons—very similar to this SR9F we are talking about.

Q. And where did you fly that plane?

A. On the same route.

Q. The same route? Did you have occasion to land that plane—a Stinson—on this same beach?

A. Yes, I landed on that same beach a couple of times with their Stinsons and many other beaches.

Q. Now, you have testified to this occurrence where this airplane was damaged. Have you ever damaged any other airplane?

A. No reportable damage. Damage up to a certain point is not reportable, but several years ago——

Mr. Cuddy: Oh, we object, if the Court please; immaterial—no part of the issues.

Mr. Manders: It certainly is material. They have alleged that he negligently did so——

Mr. Kay: Oh, where is that allegation?

(Testimony of Don Dorothy.)

The Court: If he had damaged other planes I think it would not be admissible evidence here. Therefore, the objection must be sustained. If he didn't have any other reportable damage——

Mr. Manders: Very well. This offer that you saw in the Trade-A-Plane just a moment ago—Exhibit No. 2 for identification—that refers to floats together with that?

A. That's the way it reads.

Q. Is that correct?

A. That's the way it reads, yes.

Q. Do you know the market value of floats together with such a plane?

A. I could only estimate their value. Floats for a plane of that type would cost about \$3500.

Q. \$3500? A. Roughly.

Q. There is a different finish—interior finish—to various planes, is that correct—upholstery and all?

A. That is right. Manufacturer uses different materials.

Q. Would you say, from that ad in the first exhibit which [114] you read, that the reconversion of that plane, whether it was reconverted or whether it was new, was comparable to the plane here in question?

A. May I see that Exhibit 1, please? (Clerk handed paper to witness.) Thank you. Well, it seems that this—it seems that this SR9F mentioned in here has quite a de luxe upholstery job in it—rust brown leather, pleated covert cloth up-

(Testimony of Don Dorothy.)

holstery. That rust brown leather runs into money.

Q. Was that present in the plane that's in——

The Court: I am not able to hear you, counsellor.

Mr. Manders: Was that present in the plane in this case—leather?

A. No, I think it had leatherette in it if I am not mistaken—if I remember correctly.

Q. From that ad and in this plane that is in the instant case, would you say that they are the same?

A. Well, that's awfully hard to say, just reading the ad. If I could see the two airplanes I could tell you exactly, but these ads are very misleading sometimes.

Q. It was not unholstered in leather?

A. Which one?

Q. This one here—the instant plane—Mr. McCandless's? A. Yes——

Mr. Cuddy: Wait a minute: The witness hasn't testified it was upholstered.

Mr. Kay: It is a pretty leading question, your Honor.

Mr. Manders: Will you tell me, Mr. Dorothy, how the plane owned by Mr. McCandless was upholstered?

A. Well, I don't believe I can remember. I think it had red leatherette in it, if I remember rightly.

Mr. Manders: That is all.

(Testimony of Don Dorothy.)

The Court: Is there any further cross-examination?

Mr. Cuddy: That is all, sir.

The Court: That is all. Have the jurors any questions? That is all, Mr. Dorothy. You may step down. Another witness may be called. [115]

RAYMOND I. PETERSEN,

being first duly sworn, testified for and in behalf of the defendant as follows:

Direct Examination

By Mr. Manders:

Q. Mr. Petersen, will you state your name to the jury? A. Raymond I. Petersen.

Q. You are a resident of Anchorage?

A. Yes, sir.

Q. For how many years?

A. Well, I moved to Anchorage in 1934 and I have been away part of the time, but most of the time I have lived here.

Q. What business are you engaged in, Mr. Petersen? A. An airplane operator.

Q. How long have you been engaged in that business?

A. Well, I have been engaged in the direct business for about 13 years.

Q. Do you operate airplanes yourself, as a pilot?

A. Yes, sir.

Q. Do you hold a pilot's license?

A. Yes, sir.

Q. To operate what type of planes?

(Testimony of Raymond I. Petersen.)

A. Well, anything from single-engine land up to multi-engine aircraft.

Q. How many years have you been operating planes either of single-engine or multi-engine?

A. About 17.

Q. 17 years?

A. Yes, sir—as a pilot.

Q. What types of planes have you operated?

A. Well, I have operated——

Q. That is, the names of the planes?

A. Ryans, Travelairs, Robins—oh, there's a long list—Stinson's, Douglas's, Lockheeds—those are the main ones. I couldn't remember all that I have flown or used.

Q. Have you ever purchased or bought Stinson airplanes? A. Yes, sir.

Q. Have you sold any Stinson airplanes?

A. Yes, sir.

Q. And in your purchase and sale of those planes—are [116] you familiar with a SR9F plane—Stinson? A. Yes.

Q. What would you say would be the value of a Stinson SR9F reconditioned airplane at Anchorage, Alaska, in 1947, in the month of September?

Mr. Cuddy: Well, we think there ought to a further description, sir, of the plane if it is for purposes of showing the value of this plane as to equipment and condition—how many hours on it—that's a very general description. The answer would have to be extremely general.

The Court: I think counsel ought to give fur-

(Testimony of Raymond I. Petersen.)

ther description of the plane before asking for the witness's opinion.

Mr. Manders: Take the case of a plane that has a reconditioned motor placed in it, new wings, two-way radio, instruments, and at the time the fuselage was purchased at the figure of \$1700. Now, to re-equip, reconvert that airplane in flying condition, what would be your estimate as to that?

Mr. Cuddy: Well, we object to that yet—for instance, counsel has stated “a reconditioned engine.” An engine might be reconditioned by some ham factory that is not qualified, or it could be reconditioned by the factory, and then it starts out with zero hours; and also it should state the equipment that is on the plane.

The Court: That is right, but I do not know how we are ever going to get everything written down unless counsel can get the description of the plane from the testimony and put in all the conditions.

Mr. Manders: Well, I haven't the complete description of that plane, your Honor.

The Court: Do you think you have given it so far?

Mr. Manders: Mr. Petersen, do you happen to know of a plane owned by Mr. McCandless?

A. Well, I am not familiar with who owns the aircraft. I did inspect the aircraft that I believe is in question here—18411, I believe it is—parked out beside [117] PNA's hangar.

Q. You mean at this time?

A. Yes.

(Testimony of Raymond I. Petersen.)

Q. Well, did you ever see that plane before?

A. Not that I know of. I tried to place the airplane today, and if it is the one I am thinking of it is the one that was purchased from the CAA—or the CAA had here—it was War Assets offering, and I had discussed that with my partner today and asked him if he knew anything about it——

Mr. Cuddy: We object to what some partner may have said to Mr. Petersen. That is hearsay.

The Court: You cannot repeat——

Mr. Manders: You can't testify to what your partner said, but you have no other knowledge of that plane? A. None whatsoever.

Q. As to the exact plane we are talking about, in a damaged condition? A. That is right.

Q. You have never seen it before?

A. If I did I don't remember it.

Q. Mr. Petersen, with the information that I have given you as to the reconditioning properties of this plane, and a factory reconditioned motor—450 Wasp engine, Pratt and Whitney—what would be the value of that plane?

Mr. Cuddy: We object for the previous reasons given, sir: It is not a complete question as to the condition of the plane.

The Court: I think I shall permit it to be answered. Counsel may cross-examine. If you care to give an opinion upon the description so far given you by counsel you may do so.

The Witness: Well, setting the value—or attempting to set the value on an aircraft in 1948,

(Testimony of Raymond I. Petersen.)

regardless of its condition, is fairly hard. They have depreciated to a very low price. I seriously doubt if—regardless of the condition of an airplane of that type, if here in the Territory you could get over—oh, possibly, \$5000 for it and then you would have to—you would have to find a buyer. The aircraft market is bad—it is low— [118] it has depreciated a lot. We—we have the experience of aircraft that we are forced to operate; and if we couldn't use the airplane, we have to rebuild them and put them in good condition. We put a lot of money in them, but if we had to sell them at a forced sale, or any sale, why, we would have the problem of getting a market for that airplane because a man could go out and buy a brand new plane of very much the same type for under \$10,000. So it is pretty hard to set a market value on it with an airplane 10 years of age don't sell for a very high price.

Mr. Manders: When you say "10 years of age," what year would you say that plane was manufactured? A. 1937, I believe the SR9 was built.

Q. Did you, in your business of operating an airplane, ever own a SR9 Stinson airplane?

A. We operated two SR9's. They weren't F models. Ours were C's, with a Lycoming engine.

Q. What are the main differences between those two types of airplanes?

A. Well, it's the engine.

Q. Just the engine?

A. Yes. The letter, as a rule, following the

(Testimony of Raymond I. Petersen.)

model number designates the type of engine installed in that aircraft. I believe the "F" was the Wasp engine, and the "E's" were Wrights and the "C's" were Lycomings. I believe "C's" and "J's" were also Lycomings of different horsepower.

Q. Did you have any occasion to ascertain the market price of a SR9F Stinson airplane—not new?

A. No, not that particular aircraft. I attempted to get some figures through trade sources pertaining to values for this case, and the best I could run into was a SR10, which was a year later model—Tulsa, Oklahoma, for \$4000.

Q. Is that a superior or inferior plane to the SR9?

A. Well, that is a matter of opinion, but we sold all of our SR9's two or three years ago and replaced them with 10's and the [119] subsequent SR77's and AT 19's.

Q. Mr. Petersen, have you a December issue of 1947 of the Trade-A-Plane journal?

A. Well, I believe that's the issue that I took that out of. I left it at my office. I am pretty sure it was December 2, but I wouldn't want to make a positive statement on that.

Mr. Manders: If the Court please, we would like to have that issue here and ask Mr. Petersen if he will arrange to have his office bring it here?

The Court: Very well, it may be produced.

The Witness: I am sorry I didn't bring that.

The Court: Maybe you can send for it.

The Witness: Yes.

(Testimony of Raymond I. Petersen.)

The Court: Consult with the bailiff and tell him what you want.

Mr. Davis: Is it down at the Airways Office?

The Witness: Yes, call 88.

Mr. Davis: Who shall I ask?

The Witness: Anyone in the office. Just tell them I would like to have that Trade-A-Plane laying on my desk brought up here.

Mr. Manders: That is all for the present.

The Court: Counsel for plaintiff may cross-examine.

Cross-Examination

By Mr. Kay:

Q. Mr. Petersen, what would be the approximate horsepower with the Lycoming motor in the SR9F, do you know?

A. Well, the SR9F has a Wasp; the C, the Lycoming. We—the C would be 260 and the J, which, as a rule, they convert to put the 300 Lycoming in—designated the J—would run 250 to 300 horsepower.

Q. Would a plane having a Pratt and Whitney factory 450 HP motor be more valuable than one having a 260 or 300 HP Lycoming in similar condition? A. Well, that—

Q. As far as market value goes?

A. That again is a matter of opinion. We have discussed using the Wasp Jr. Stinsons and [120] turned them down due to the fact they aren't as good a small field airplane as the Lycomings, so it depends entirely upon what the use of the airplane

(Testimony of Raymond I. Petersen.)

is. To some people, why, there's no doubt that the airplane would be of a greater value, but to ourselves it wouldn't. It's definitely a lower value.

Q. Now, I believe, Mr. Petersen—correct me if I am wrong—that on your direct examination by Mr. Manders you estimated, in response to his question in which he laid the description of the plane, roughly that such a plane in 1948 would be worth approximately \$5000?

A. Well, that was a—is understandably a wild guess because it is a question of the buyer getting together with the seller and depending entirely on how bad the seller wants to sell and the buyer wants to buy.

Q. Certainly. It is just your opinion—your opinion as an expert?

A. Well, I based that—I based that on the—on this SR 10 advertised in Tulsa plus a thousand dollars to get it up here.

Q. I see.

A. Now, that was the only basis on which I could make a statement.

Q. What I was driving at, Ray: Did you mean 1948 when you said that, or did you mean 1947?

A. Well, December, of course would be 1947, but I doubt if the one month or the two months involved make a lot of difference.

Q. You were speaking more or less as of the present time?

A. That is right.

Q. Well, now, it is true there has been some

(Testimony of Raymond I. Petersen.)

depreciation all through 1947 in the market value of aircraft here, hasn't there?

A. The market value of aircraft has really taken a nose dive.

Q. Well, now, Ray, I am going to ask you a hypothetical question, describing pretty completely this particular type. I have asked Mr. McCandless to write out a description of it for me here so we can get all the facts, and keep in mind—this [121] will be hard to do, I know—we are speaking of the month of September, 1947. We have got to refer to the market value at that time, not the present time. So, bearing those things in mind, let me ask you what your best opinion would be as to value in September, 1947, of a Stinson SR9F plane, Gull wing type, 450 Pratt and Whitney engine at zero hours—that is, complete factory overhaul—rebuilt, a Hamilton constant speed controllable pitch propeller, the ship being completely majored as to air frame and engine—the engine at the factory—having the following equipment: A two-way radio, three band directional loop, full instrument group for blind flights, licensed in full for day and night, three flares: Now, based on that description as of September, 1947, what is your best opinion as to the value of that ship?

A. Well, I just about have to go back to my testimony under Mr. Manders' questioning, and that is that the condition of the aircraft never seems to take—make too much of an impression on a buyer, that is, if he pays what it is actually—he is

(Testimony of Raymond I. Petersen.)

not going to pay what it is actually worth. Anyone that rebuilds an airplane that may have cost them three or four thousand dollars and puts four or five in it is really an optimist if he thinks he is going to get the four or five thousand dollars out of it. I can't see where the market value has changed materially since September—between September and now. The market of that type of aircraft crashed when new, faster and more efficient planes became available, and that was in the early part of 1947. It appears to me that the value of an aircraft in such fine condition—now, if I were selling mine, which I have in first class shape, why, I wouldn't feel that I could sell them for any less than I had in them, but if I was buying them I would probably look at it altogether different. I would scout the market pretty well and I would probably find an airplane in very good condition that someone would sell who needs the money. Just like this fellow in Tulsa: He must need the [122] money to sell the airplane.

Q. Well, would you feel free, Ray, to give us your opinion on that hypothetical question I asked you as of September, '47?

A. Well, I don't see how it would be—how there would be any particular difference between then and now. I can't see that the airplane would bring over \$5000. Now, I may be very wrong there, but I just continually dabble in the market and looking for aircraft we could use. I know that I

(Testimony of Raymond I. Petersen.)

wouldn't be inclined to pay it, if I had a use for that type of aircraft.

Q. So, your best opinion, then, still would be that even in September, 1947, that estimate would be about \$5000?

A. Well, that's right. I couldn't—

Q. Now, when you answered that 5000 before, Ray, did you consider—well, let me ask you this: What is the value, approximately, of a Hamilton constant speed and controllable pitch propeller, if you know?

A. Well, inasmuch as there's thousands of them surplus, and you can buy an aircraft complete with the engine that's in this airplane, complete with that Hamilton standard propeller, for in the neighborhood of anywhere from five to eight hundred dollars, and get all the instruments that you could possibly use in an airplane thrown in from War Assets, why, I couldn't put a very high value on those props. We bought 10 of them from War Assets here sometime ago for \$25.00 apiece and some of them had no time on them since they were completely overhauled, though when you put them in an overhaul shop they can very quickly run up a hundred or \$125 bill on you, so the value of equipment such as that can be bought surplus is not high; but when you put it in an overhaul base the price goes up because you are getting these inflation dollars involved on that thing.

Q. In other words, when you put four or five months time into it the price goes up?

(Testimony of Raymond I. Petersen.)

A. That is right, but the market is still affected. [123]

Q. By the supply?

A. By the low—the low cost of the supplies.

Mr. Kay: I believe that's all.

The Court: Is there any redirect examination?

Redirect Examination

By Mr. Manders:

Q. Well, just let me ask you one question: Mr. Kay stated to you that that plane was without any hours on it—started at zero. Would the same thing apply if it had 60 hours on it, as to value?

A. Well, let's see: I believe if you depreciated the engine at—oh, very high rate of \$4.00 an hour, why, you would get—

Q. Mr. Petersen, I show you the Trade-A-Plane service paper, third December issue, 1947, and you have stated that you took a figure for the fair market value from that paper. Is that the plane you referred to, marked with a red pencil on that sheet of paper?

A. Yes, sir.

Q. And what type of plane is that?

A. The plane listed here is a SR10F.

Q. And will you just read that ad?

A. (Reading):

“Stinson SR-10-F: Commercial job with Wasp 450 hp AN engine. All instruments and extras, VHF radio, 502 total engine hours, 158 since overhaul. \$4000 f.o.b. Southwestern Aero Exchange, 7744 East Apache, Tulsa, Oklahoma.”

Q. Is that plane comparable to the SR9?

(Testimony of Raymond I. Petersen.)

A. Well, it is a later model—year later. There was quite a difference in the design of the two aircraft—windshields and so forth.

Q. The SR10, even as a new plane, would not be of lesser value, would it?

A. Oh, no, I should say not.

Mr. Manders: I would ask that this be marked Defendant's Exhibit 1.

The Court: Is there objection?

Mr. Cuddy: No objection, sir.

The Court: It may be admitted and marked Defendant's Exhibit A. [124]

(Defendant's Exhibit A admitted in evidence.)

Mr. Manders: That's all.

The Court: Is there any further cross-examination?

Mr. Kay: Just a little, your Honor.

Recross-Examination

By Mr. Kay:

Q. Mr. Petersen, is it or is it not a fact that the SR10 is a straight-wing monoplane?

A. The wing is practically the same. They are both Gull wings.

Q. Both Gull wings? A. Uh-huh.

Q. Is there any difference between the gross weight and the pay load that would be carried by a SR9F and a SR10?

A. Yes, the SR10 has a—now, I can't speak for the 10F, again,—but the SR10C has—

(Testimony of Raymond I. Petersen.)

Mr. Cuddy: Well, now, your Honor, we object if he can't speak as to the airplane that is advertised here and under discussion.

The Court: Objection is sustained.

Mr. Kay: I note that this airplane has 502 total engine hours—158 since overhaul. That doesn't indicate to you—or does it—whether or not the overhaul referred to—158 since—was a major overhaul, or not?

A. Well, yes, that would be 158 hours since major overhaul, I would assume.

Q. Would they refer, then, to the 502 total hours—it would start at zero, wouldn't it?

A. Well, it meant the engine was brand new 502 flying hours ago and that 158 hours ago the engine was given a complete major overhaul.

Q. That is what that advertising means to you?

A. That is what would be the general idea.

Mr. Kay: That is all.

The Court: That is all, Mr. Petersen. Another witness may be called. [125]

Mr. Davis: Defendant rests, your Honor.

The Court: Is there any rebuttal evidence?

Mr. Kay: Your Honor, we have just a very brief amount of rebuttal evidence. We have a witness we would like to obtain. I wonder if we could suspend now and start at 1:30.

The Court: Would that be agreeable to the defendants?

Mr. Davis: If possible, I would like to make it two o'clock. If it is a very brief witness we ought to be able to get through anyway.

Mr. Cuddy: I wouldn't say, sir, over a half hour.

Mr. Kay: Or 15 minutes.

The Court: Well, do counsel care to be limited as to arguments?

Mr. Manders: That is all right.

The Court: Will counsel be satisfied with an hour on each side for arguments?

Mr. Davis: We are satisfied.

The Court: There is no compulsion about it.

Mr. Kay: Perfectly satisfactory, your Honor.

The Court: Very well, it will be understood counsel will be limited to an hour a side for argument, and upon Mr. Davis' request the meeting hour will be two o'clock. That ought to give us time to finish.

(The Court then duly admonished the trial jury about discussion of the case, and the trial was continued until two o'clock p.m., and recess was had at 11:43 o'clock a.m.)

Afternoon Session

The Court: Roll of the jurors may be called.

(Jurors in the box all present.)

The Court: Do plaintiffs care to offer any rebuttal testimony?

Mr. Kay: Yes, sir.

Mr. Cuddy: Yes, sir.

The Court: You may call a witness in rebuttal.

Mr. Kay: Call Mr. Ray Petersen. [126]

The Court: Is that the same witness who testified this morning?

Mr. Kay: Yes, your Honor.

RAYMOND I. PETERSEN,

heretofore duly sworn, resumed the stand and testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Petersen, are you the same gentleman who testified this morning? A. Yes, sir.

Q. I believe you testified this morning that you had been flying about 17 years in the Territory of Alaska?

A. Well, no; 14 years in the Territory. I practiced a little before coming up here.

Q. And that you are an airline operator in the Territory at the present time? A. Yes, sir.

Q. Mr. Petersen, in view of the qualifications that Mr. Manders brought out on your direct examination this morning, your experience in flying in the Territory of Alaska, I will ask you whether or not you would consider the plane described this morning—the Stinson SR9F aircraft—with the size tires and wheels that that plane has, and the weight it carries, a safe aircraft for use in beach operations in Southwestern Alaska?

A. Well, I would say that it is not a good airplane for beach operations.

Q. Would you qualify that as to whether you consider that aircraft a safe type of aircraft for use in beach operations in Southwest Alaska?

A. Well, I wouldn't consider it as such, no.

Q. Would you, as an airplane operator in

(Testimony of Raymond I. Petersen.)

Alaska, use an aircraft of that type for beach operations yourself? A. Well, we don't.

Mr. Kay: That's all.

Cross-Examination

By Mr. Manders: [127]

Q. Mr. Petersen, on what do you base your opinion that that aircraft wouldn't be a safe aircraft to land on a beach in Southwestern Alaska—Southeastern?

Mr. Cuddy: Southwestern.

Mr. Manders: Southwestern Alaska?

A. Well, we have always considered it too heavy an airplane for the size of the wheels to use on a beach operation. We always used a different type of aircraft for that use—something with air wheels or at least large semi-air wheels.

Q. Have you, during your years of flying, ever flown a plane of this type and landed it on the beach where this plane was landed?

A. Where this plane was landed?

Q. On that beach? A. No, sir.

Q. Have you ever landed any of your planes on the beaches along Cook Inlet there?

A. No, I never have.

Q. Where have you landed your planes?

A. Well, we operate—the few beach landings we have were along the Bering Sea out of—oh, Goodnews Bay, mainly—Goodnews and Togiak Bay area.

Q. Then, is your opinion based upon your experience in the Bering Sea and Goodnews Bay

(Testimony of Raymond I. Petersen.)

rather than any actual experience in Cook Inlet?

A. Well, yes, I am afraid it is.

Mr. Manders: That's all.

Mr. Kay: That is all.

The Court: That is all, Mr. Petersen.

Mr. Kay: Mr. Petersen, I would like to ask you a few more.

Redirect Examination

By Mr. Kay:

Q. Are the beaches that you mentioned along the Bering Sea of a similar type, if you know, to the beaches in the Southwestern Alaska area?

A. Well, I believe the beaches along the Cook Inlet area are more subject to mud—tide flats—than the beaches along the Bering Sea. There very seldom we have mud flats in that area. [128]

Mr. Kay: That is all.

The Court: That is all, unless the jurors have questions. Another witness may be called.

Mr. Kay: Mr. W. O. Epps, please.

W. O. EPPS,

heretofore duly sworn, resumed the stand and testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Epps, are you the same gentleman who testified here yesterday? A. Yes, sir.

Q. Do you realize you are still under the same oath that you were yesterday when you testified?

A. Yes, sir.

(Testimony of W. O. Epps.)

Q. Now, there was some testimony about the amount of time that you boys at United Airmotive put on this particular plane, Woody: I wish that you would state what that work which you did on this plane would have cost if it had been done for an outside party who had brought that ship into there for repair?

Mr. Davis: Your Honor, that is improper rebuttal. Object to any such testimony.

The Court: Objection is sustained.

Mr. Kay: I will ask you, if you know, Mr. Epps, what the amount of the reasonable value of the time that you boys put in on this plane actually was?

Mr. Davis: Same objection, your Honor.

The Court: Objection is sustained.

Mr. Kay: Now, Mr. Epps, I believe you testified yesterday that you had had experience as a pilot in flying this particular ship? A. Yes, sir.

Q. And have you—I can't recall whether you testified as to the extent of your experience as a pilot? A. I have about 4000 hours.

Q. About 4000 hours? Mr. Epps, I will ask you whether or [129] not in your opinion this particular ship—this Stinson SR9F—considering the size of wheels and tires it had on it, was a safe ship to use in beach operations in Southwestern Alaska?

Mr. Davis: Your Honor, I object to that question. If he wants to limit it to the beach in question, all right. Southwestern Alaska is too vague.

The Court: Objection is sustained.

(Testimony of W. O. Epps.)

Mr. Kay: I will ask you the same question, Mr. Epps, with reference to the beach across the river in front of the cannery at Kenai?

A. Well, most beaches here are about the same. They change with every tide. I wouldn't say that it was a beach airplane.

Mr. Davis: Now, your Honor, I move that the answer be stricken—not responsive to the question. He has attempted to answer the question I objected to.

The Court: The motion is granted. The answer is stricken and the jury instructed to disregard it because it is not an answer to the question asked.

Mr. Kay: Mr. Epps, I am sorry, but could you—would you feel it possible for you to answer this specific question: In other words, would you consider this particular airplane a safe airplane to use in landing on the particular beach in question at Kenai?

A. Well, I have never landed on that beach—that particular spot. I have landed a little farther down on that beach, below Kasilof. So I couldn't answer that question for that particular spot where the airplane was at that time.

Q. When you landed at that beach what type of aircraft were you using?

A. I used a Cub cruiser, and also a trainer.

Q. Are they similar to the aircraft in question?

A. No, it's a light aircraft.

Mr. Cuddy: Your Honor, so as not to conflict with the Court, may we ask this witness if he would

(Testimony of W. O. Epps.)

use a ship of this type for landing on that field or on the beach off Kenai south of the [130] river?

The Court: You may ask it. If it is objected to it will be ruled out because the witness has testified he has never been on that particular beach.

Mr. Cuddy: May we ask for that area?

The Court: Well, the area may embrace 20 miles. I do not know—I do not see it.

Mr. Cuddy: All right, sir.

The Court: That is all. Is there any cross-examination?

Mr. Davis: No cross-examination, your Honor.

The Court: That is all, Mr. Epps. Another witness may be called.

Mr. Kay: Mr. McCandless, please.

CHARLES A. McCANDLESS,

heretofore duly sworn, resumed the stand and further testified in his own behalf as follows:

Direct Examination

By Mr. Kay:

Q. Mr. McCandless, are you the same Charles McCandless who testified yesterday?

A. I am.

Q. Mr. McCandless, there was some testimony here—you heard Mr. Dorothy testify as to the distance, the location of your car from your trailer. Will you tell the jury, please, exactly where your car was parked on the evening when the conversation with Don Dorothy occurred? Could you draw a little diagram of that portion of the trailer court

(Testimony of Charles A. McCandless.)

on the blackboard? Would that make it easier for you to testify?

A. I could, but I would have to give an explanation with it.

Mr. Kay: I will ask permission of the Court to do that.

The Court: The trouble with blackboard drawings, they have been permitted in the past and may be again, but in the event of appeal, it is very difficult, if not impossible, to put a [131] blackboard drawing into a record on appeal. So if any drawings are made I think they ought to be on paper so they will be available to any other court in event of appeal.

The Witness: Well, your Honor, I might state I think I can state very clearly. Why, my car was parked—in a trailer court space is at a premium. The way the court operates, they get \$35.00 a month for space for one car and one trailer. Each renter has the space allotted for his car and trailer to be parked. If you don't get in that particular spot you are blocking someone else from getting their cars in and out. So I will repeat that my car was parked within four feet of the door of my trailer. I also made a statement I was working on my car, and I kept my tools in the trailer. So there would be no earthly sense of my parking 30 or 40 feet away from the trailer and walking back and forth between the trailer and my car, and work on my car on someone else's ground.

(Testimony of Charles A. McCandless.)

Q. Where were you and Mr. Dorothy standing when you started your conversation?

A. When I started my conversation with Mr. Dorothy I had closed the hood of my car and reached inside and turned the key off and stepped back to where he was standing at the left fender of my car, which was about the four feet I said my car was from the trailer, that is, the door of the trailer and the width of the car, which could not have been more than four and a half feet, and we were leaning against the fender. (This was described with gestures.)

Q. Now, Mr. McCandless, you have heard Dorothy testify that you entered into an agreement with him, or that you entered into an agreement with him whereby he could take the plane down to a hangar—the PNA hangar for inspection. I will ask you whether you at any time gave the defendant, Don Dorothy, permission to fly that airplane?

A. I did not. I gave him permission to taxi the airplane from where it was tied down on the line to the PNA hangar. [132]

Q. Approximately how far away is that?

A. Less than a—approximately a city block. I don't know exactly how far it is. He asked for an inspection of the aircraft and that's what I gave him permission to do. I did not give him permission to fly the plane.

Q. Mr. McCandless, I think you testified yesterday that you have been a flier for considerable time.

(Testimony of Charles A. McCandless.)

Will you state approximately how long you have been a flier again?

A. I got my license in '42, but I was flying considerable on a student license ahead of that. In fact, to be exact, I started flying again in '39, but I had previous experience before.

Q. I will ask you whether or not you would have, as owner and pilot of that plane, have used that plane for beach operations in Southwest Alaska?

A. I would not. It was too heavy a ship and had too small tires on it to land on sand beaches.

Mr. Kay: That is all.

The Court: Counsel for defendants may examine.

Cross-Examination

By Mr. Davis:

Q. Mr. McCandless, I understood you to say yesterday you received your license in 1946. I understood you now to say you got your license in 1942.

A. I meant '42, sir. I got my license in my pocket. I could——

Q. I just want to get it correct. Is the date 1946?

A. '46, that is right.

Q. And what kind of license?

A. That is strictly a private license—single-engine landing.

Q. That, then, doesn't give you any authority to hire—or carry passengers for hire?

A. Not for hire, but I can haul all the passengers or freight I can on my personal operation—or according to CAA operations. I can haul all the pas-

(Testimony of Charles A. McCandless.)

sengers I want to and let them pay their shares of the expenses of the plane. [133]

Q. But you do not hold a commercial license?

A. No, I do not.

Q. Your license is the license known as a private license, isn't that correct? A. That is correct.

Q. What other type ships have you flown besides this Stinson, Mr. McCandless?

A. Oh, considerable number—been mostly private aircraft.

Q. What—just name some of them?

A. Cub, Super Cruisers, Aeroncas, the Silvaire, Luscombe Silvaire, the old Luscombe; flown a Beechcraft Bonanza; I have flown Stinsons of other types—L-5's—

Q. Let's go back a little bit: Now, what is the horsepower on a Cub? On a trainer, let's say?

A. That is 65 to 75 horsepower—some trainers have 85.

Q. All right, what is the horsepower on a Silvaire—on the Silvaire that you used to own?

A. 65 to 85.

Q. On the one you used to own, Mr. McCandless? A. That was a 65.

Q. And on the Super Cruiser?

A. That's a hundred horse.

Q. And on an L-5?

A. 145 or 150—I am not sure.

Q. Now, have you flown any other heavy aircraft except the one in question here?

A. Not enough to say I had flown it, no.

(Testimony of Charles A. McCandless.)

Q. Now, you say you had flown a Beechcraft Bonanza. Now, that is a considerably bigger type plane than these others, with the exception of the Stinson? A. Yes, it is.

Q. What is the horsepower on a Beechcraft Bonanza? A. 165.

Q. And that is all metal?

A. That is right—very fast.

Q. Retractable landing gear? A. Yes.

Q. Flaps? A. Yes.

Q. Did you solo that plane? A. Yes.

Q. Where did you fly it?

A. Seattle, Washington.

Q. Just around the airport there?

A. More or less, yes, within the radius of the airport area—three or four miles of the airport.

Q. How many hours did you put on this plane after you got it—this Stinson 9F?

A. Very few. I think the ship had a total of 49 hours and some minutes on it when I bought it, and when the plane was crashed, that is what I had used it—run it up to 69 hours.

Q. Roughly 20 hours? A. That is about all.

Q. Did—Well, now, just a minute: A part of that was this charter trip we talked about yesterday—this M-K trip? A. That is right.

Q. How much time did that trip take?

A. I don't recall exactly.

Q. About?

A. Oh, it was probably eight hours—eight, nine hours—something like that.

(Testimony of Charles A. McCandless.)

Q. The trip to Aniak and back?

A. Round trip, yes.

Q. So you had, then, roughly, nine, ten, 11 hours—something like that—yourself in this ship?

A. That is right. That's all I got to use it.

Q. You bought the plane the 15th of July?

A. That's right.

Q. And you had it, then, until the sixth of September?

A. Correct.

Mr. Davis: That's all, Mr. McCandless.

Mr. Kay: That is all.

The Court: That is all, Mr. McCandless, unless the jurors have some questions. Another witness may be called.

Mr. Kay: No further testimony, your Honor.

The Court: Any surrebuttal testimony?

Mr. Davis: May we have a couple minutes, your Honor? Like to call Mr. Dorothy, your Honor.

The Court: Mr. Dorothy may take the witness stand.

DON DOROTHY

heretofore duly sworn, resumed the stand and further testified for and in behalf of the defendants as follows: [135]

Direct Examination

By Mr. Davis:

Q. Mr. Dorothy, in testifying this morning you qualified yourself, told what kind of planes you had flown and how you had flown them, and I believe you testified that you had landed repeatedly on this

(Testimony of Don Dorothy.)

beach in question. Now, I will ask you, Mr. Dorothy, if there was anything about this plane that made it unsafe to land this plane on that particular beach?

A. Not a thing.

Q. Was this a safe place for landing this airplane?

A. I would say that it was. I have been on there with similar aircraft since several times.

Q. Do you know as to whether or not other pilots using similar aircraft land on that beach repeatedly?

A. Yes, Alaska Airlines lands there all the time with Stinsons.

Mr. Davis: I think that's all, Mr. Dorothy.

Cross-Examination

By Mr. Kay:

Q. Mr. Dorothy, I believe you testified on direct that you had landed on that beach for two or three years?

A. That's right.

Q. And I believe you testified that that was using the Travelaire, I believe you said, for Pacific Northern Airlines?

A. That is right.

Q. There is quite a considerable difference between that Travelaire and this Stinson with regard to the size of the wheels. is there not?

A. That is right.

Q. The Travelaire has big air wheels on it?

A. That is right.

Mr. Kay: That is all.

The Court: That is all, Mr. Dorothy. Is there any further surrebuttal?

(Testimony of Don Dorothy.)

Mr. Davis: One minute, please, your Honor. In view of the rebuttal which has been brought up here, your Honor, it may [136] be wise if we get some other testimony on this point besides Mr. Dorothy. We have a call in for some other operators we would like to get in here on this point. I wonder if we might have a few minutes to see if we can't round them up?

The Court: How much time?

Mr. Davis: We can know in 15 minutes as to whether or not we can get them or not. I sent Mr. Dorothy out to phone and he couldn't get them and he didn't want to be away too long.

The Court: Court will stand in recess until 2:45.

(Whereupon recess was had at 2:30 o'clock p.m.)

After Recess:

The Court: Another witness may be called.

Mr. Davis: I would like to call Bill Smith, your Honor.

WILLIAM V. SMITH

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Smith, will you state your name?

A. William V. Smith.

Q. Where do you live? A. Anchorage.

Q. Now, speak up real loud; it is hard to hear.

(Testimony of William V. Smith.)

A. Anchorage.

Q. How long have you lived in Alaska, Mr. Smith? A. All my life.

Q. What is your business?

A. Pilot—I fly.

Q. What sort of pilot's license do you hold, if any? A. Commercial.

Q. And what type aircraft are you authorized to fly?

A. Well, I have been flying single-engine airplanes for the last five years—all types, land and sea—or the last six years.

Q. And have you flown a Stinson Gull wing?

A. Yes.

Q. —type of plane? Are you familiar with that type of plane? A. Yes. [137]

Q. Now, Mr. Smith, were you formerly employed by Alaska Airlines? A. Yes, I was.

Q. Are you familiar with the various beaches up and down Cook Inlet here between here and Homer?

A. Yes.

Q. Are you familiar with the beach known as the cannery beach at Kenai? A. Yes.

Q. Have you been at that beach?

A. I have landed at it.

Mr. Cuddy: I didn't hear the answer.

The Witness: Yes, I have landed near that beach.

The Court: Will you speak a bit louder?

Mr. Davis: Mr. Smith, have you landed on various beaches in this part of Alaska? A. Yes.

Q. Now, in relation to the beach at Kenai—the

(Testimony of William V. Smith.)

Kenai cannery beach—how does that compare with other beaches in this part of the country, as far as being safe for landing aircraft?

Mr. Cuddy: We object, if the Court please—immaterial, and we were not allowed to ask questions as to beaches other than the beach here in question.

The Court: Objection is sustained.

Mr. Davis: Your Honor, I have tied that down to this particular beach.

A. I believe it is a good beach——

Mr. Cuddy: Wait a minute.

Mr. Davis: Don't answer until the Court rules. I asked him how this beach compares to other beaches and he has been on this beach.

The Court: Well, doesn't that open up the question of landing on various other beaches? I think you are going too far afield, counsellor. I think you ought to confine yourself to the beach in question.

Mr. Davis: All right, your Honor. Now, Mr. Smith, with regard to a Stinson type 9 airplane, you say you are familiar with that type?

A. Yes. [138]

Q. Know what kind of tires it has on it?

A. Well, almost all of them have small wheels on them—small tires.

Q. In your opinion, Mr. Smith, would there be anything unsafe about landing an airplane of that type on the beach at Kenai?

A. No, not with caution.

Mr. Davis: I think that's all. Just a minute, now, they may wish to cross-examine.

(Testimony of William V. Smith.)

Cross-Examination

By Mr. Cuddy:

Q. Have you ever flown a SR9F, Bill?

A. I have flown SR9's, but not the F.

Q. Then you never have flown a ship of this type?

A. Yes, I have.

Q. Have you flown one where it weighs as much as this SR9?

A. Well, I have flown planes that weighed twice as much in worse places.

Q. On this beach?

A. Not that particular beach.

Q. All right, let's stick right to this one beach. Now then, what is the size of the tire on a SR9F?

A. Well, I can give you the approximate diameter.

Q. All right, what would be the diameter?

A. Oh, that tire is probably about 18 inches—approximately.

Q. 18 inches?

A. Approximately. Perhaps a little bit larger.

Q. Are you sure of that?

A. I said approximately.

Q. Approximately that?

A. Uh-huh—yes.

The Court: Is that the diameter?

The Witness: The diameter of the wheel—outside diameter.

Mr. Cuddy: You mean the diameter?

A. The diameter of the whole wheel.

Q. Of approximately 18 inches?

A. Yes.

The Court: I am not sure that I understand it.

(Testimony of William V. Smith.)

Will you explain it again, Mr. Smith, what this diameter is, so that we all get it straight? Is that the diameter of the tire itself [139] —of the round tire?

The Witness: No, of the wheel as a whole, including the tire.

The Court: Oh, the wheel as a whole?

The Witness: Including the tire.

The Court: All right.

Mr. Cuddy: What would be the width through the tire?

A. That's about—that depends on the Stinson; some have seven, some have nine, and some have ten.

Q. Now, then, what planes have you landed on this particular beach?

A. I never landed a Stinson in there.

Q. You never did land a Stinson there?

A. Oh that beach, no.

Q. And what planes have you landed there?

A. Well, I have landed on that particular beach—I have landed there with Cubs.

Q. A light plane? A. Uh-huh.

Q. And on that particular beach the only plane that you have landed has been a light plane?

A. Yes.

Mr. Cuddy: That's all.

Redirect Examination

By Mr. Davis:

Q. Now, Mr. Smith, one particular question: At the time you landed there did you observe the ground of the beach? A. Yes.

(Testimony of William V. Smith.)

Q. And what kind of ground is it? What's the material of which the beach is made up?

A. Well, it depends upon which part of the beach.

Q. Well, take the north end of the beach—up beyond the cannery toward the river?

A. Well, there is hard sand in there and further on there's mud—mud flats.

Q. Was it hard packed sand? A. Yes.

Q. Or was it soft? A. No, it was hard.

Q. Now, the tide comes up on that beach every day, does it?

A. Well, I presume it does. I don't know; I haven't been there.

Mr. Davis: That is all. [140]

Mr. Cuddy: No further questions.

The Court: That is all, Mr. Smith. You may step down.

Mr. Davis: Thank you, Bill.

The Court: Any further testimony?

Mr. Davis: The defendant rests.

The Court: Next come the instructions to the jury.

Mr. Davis: If the Court please, I think Mr. Manders wishes to renew his motions.

Mr. Manders: I don't know whether you desire to have the jury excused or not?

The Court: No; I will do whatever counsel suggests. Do you wish the jury to be excused?

Mr. Manders: I think they had better be excused.

The Court: Ladies and gentlemen, will you retire to the jury room for a few minutes?

(Jury retired to the jury room.)

The Court: You may proceed, Mr. Manders.

Mr. Manders: At this time, your Honor, I wish to renew the same motions that were made this morning at the time of the close of plaintiff's case—the same two motions.

The Court: The motions and each of them will be denied, and in this case, as in every other case, exception will be noted as of course to all adverse rulings of the Court.

Mr. Davis: If the Court please, I would like the record to show, if I may, that I would like to concur in the motions and renew the motions at this time on behalf of Mr. Dorothy.

The Court: Record will so show.

Mr. Davis: And I would like the record also to show I concurred in the requested instructions submitted by Mr. Manders on behalf of his client. I would like to request the same instructions for Mr. Dorothy.

The Court: The record will show that the requested instructions [141] actually physically submitted by Mr. Manders yesterday on behalf of defendant Pacific Northern Airlines, are submitted also on behalf of defendant Don Dorothy.

Mr. Manders: Here are four additional instructions, your Honor. I have given copy to Mr. Cuddy and I would like to present them to the Court.

The Court: You may send them up to the desk.

Well, the instructions as prepared contain nothing on that precise subject. I think there isn't any doubt about the validity of the rule of law contained in the instructions. I have already covered the subject matter of Defendant's Requested Instruction No. 21. I shall give Defendant's Requested Instruction No. 20 as 7-C, only the words "of trover" in the second line will be stricken out since the words may mean nothing to the jury, and substitute the words "such as this." The instruction then will read:

"The market value of the property at the time of its conversion is generally the measure of damage in an action such as this. You may take into consideration its worth a reasonable time before and subsequent to the time of the alleged conversion in this action."

Mr. Davis: That is going to be what?

The Court: It will be 7-C. It will be re-typed.

The jury may be recalled.

Mr. Davis: There are two technical objections I have to these instructions I thought the Court might like to have called to his attention. In Paragraph 1, Instruction 1, Line 20, in talking about what the complaint alleges. it says that the plaintiff alleges that Dorothy flew the aircraft "from Anchorage, Alaska, to Kenai, Alaska, where the said defendant Dorothy landed the airplane upon a beach of Cook Inlet"; It is my remembrance that the complaint says "Kasilof," your Honor, instead of "Kenai" and I believe that that should be corrected.

Then on the next page, the last line leaves out—I think the Court meant to say “therefore” and the “fore” isn’t there— [142] on 1-A.

The Court: Yes—“therefore.”

Mr. Davis: Paragraph VI, your Honor, of the complaint is the one I had reference to.

The Court: In the foregoing paragraph the averment is that the defendants wrongfully and unlawfully flew such aircraft from Anchorage, Alaska, to Kasilof and Kenai.

Mr. Davis: That is right, your Honor, but where it talks about landing the aircraft on the beach of Cook Inlet, I believe it is strictly Kasilof.

Mr. Kay: Your Honor, of course, at the time this complaint was drawn we had very little knowledge of the actual facts. I wonder if a motion to conform the pleadings—amend the pleadings to conform to the proof might be in order in that regard. The complaint alleges a beach “near the town of Kasilof.” It should be a beach “near the town of Kenai.”

The Court: Does counsel wish to amend the complaint in that particular?

Mr. Kay: I do move to so amend the complaint.

The Court: It may be amended by striking the word “Kasilof” in Paragraph VI of the complaint, and the word “Kenai” inserted in lieu thereof, and the clerk may make the change. Then the instruction may remain as it is.

The jury may be recalled.

(Jury was recalled.)

The Court: Without objection the record will show all members of the jury to be present.

Ladies and gentlemen of the jury (reading):

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the [143] matters at issue between the plaintiff and the defendants in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the fact in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

The plaintiff, C. A. McCandless, has sued the defendants Don Dorothy and Pacific Northern Airlines, Inc., a Corporation, in this action claiming that in September, 1947, the plaintiff was the owner of a Stinson airplane, SR9F type, equipped with a 450-

horsepower Pratt and Whitney engine; that in early September the defendant, Don Dorothy, who was then and there an employee and acting as an agent of the defendant Pacific Northern Airlines, Inc., approached the plaintiff with a view of considering the purchase of the airplane by the defendant corporation, and thereupon it was verbally agreed that the said defendant Dorothy might take the airplane to the hangar owned by the defendant corporation at Merrill Field, Alaska, for the purpose of having the same examined and inspected by employees of the defendant corporation; but that thereafter the said defendant [144] Dorothy, acting for and in behalf of said defendant corporation, wrongfully and unlawfully took possession of said airplane and converted the same to the use and benefit of the defendant corporation and on September 6, 1947, flew said airplane from Anchorage, Alaska, to Kenai, Alaska, where the said defendant Dorothy landed the airplane upon a beach of Cook Inlet; that in making said landing the airplane was wrecked and as a result of said wreck was rendered totally worthless; that the value of the airplane on September 6, 1947, was \$8,500.00 and, therefore, plaintiff demands judgment against said defendants for that sum.

The defendants Dorothy and Pacific Northern Airlines, Inc., have answered separately but their answers are substantially to the same effect. The answers of defendants deny any wrongful taking of the airplane and deny that the value thereof on September 6, 1947, was \$8,500.00. The defendant Dorothy states in his answer that the aircraft at the time

the defendants took possession of the same was of a value not exceeding \$6,000.00. The defendant corporation in its answer avers that the value of the aircraft at said time did not exceed \$3,500.00. Both defendants assert that the plaintiff entered into an oral agreement with Dorothy, the latter acting for the defendant corporation, wherein and whereby it was agreed that the plaintiff chartered the airplane to the defendants upon an agreed and stipulated rental of \$35.00 per hour; that the defendant Dorothy was operating said plane on September 6, 1947, and while landing on the beach at Kenai, Alaska, the right wheel of the aircraft became locked causing the airplane to veer sharply to the right and into the mud below the beach; that the incoming tide partly covered the airplane and caused damage thereto; that the beach at the place selected by defendant Dorothy was hard and was in safe condition to make a landing and that, in fact, the landing was made safely and no damage would have resulted except for the mechanical failure of the aircraft the [145] cause of which the defendants assert is unknown to them; that the defendants were not negligent in any manner in making the landing at the time and in the place described; that all reasonable precautions were used in flying and landing the aircraft.

The plaintiff in his replies to the defendants' answers denies that the taking of the airplane by the defendants was under any rental or charter agreement and denies generally the allegations of defendants answers inconsistent with the plaintiff's complaint.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in this case consisting of the plaintiff's complaint, the defendants' answers thereto and the plaintiff's replies to said answers. You should therefore read and consider the pleadings carefully in order to determine the respective claims of the plaintiff and the defendants in this action.

Both of the defendants by their answers have admitted the allegations contained in Paragraphs I, II and III of the plaintiff's complaint, as follows: That at all times mentioned in the complaint the plaintiff was the owner of the airplane described in Paragraph I of the complaint; that at all times mentioned in the complaint the defendant Dorothy was an employee and agent of the defendant Pacific Northern Airlines, Inc., a corporation; and that said defendant Pacific Northern Airlines, Inc., is a corporation. Hence it was not necessary to offer any proof on any of the allegations so admitted.

In this case, as in all civil cases, the burden is upon the plaintiff to prove his case by a preponderance of the evidence only, and not, as in criminal cases, beyond reasonable doubt. Preponderance of evidence means the greater weight of evidence. If the evidence in your mind is equally balanced as [146] between the plaintiff and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiff to present evidence of greater weight than that in favor of the defendant before plaintiff is entitled to recover.

As stated in the plaintiff's complaint, this is an

action for conversion of personal property. Conversion consists in the exercise of dominion and control over property inconsistent with and in denial of the rights of the true owner or the party having the right of possession. It is the exercise of such a claim of right or dominion over the property as assumes that the claimant is entitled to possession so that the true owner or the party rightfully entitled to possession is deprived of the property. Conversion may be otherwise defined as any distinct act of dominion exerted over another's property in denial of the right of the true owner or possessor to the possession of the property.

If you find by a preponderance of the evidence that on or about September 6, 1947, the plaintiff was the owner and entitled to the possession of the airplane described in the complaint at Merrill Field, Alaska, and that on said day the defendants took possession of said airplane, without right and without authority from the plaintiff, and the defendants did not return said airplane to the possession of the plaintiff and converted said property to their own use, then your verdict should be for the plaintiff in such sum as, under the evidence and the instructions of the Court, you find to have been the fair market value of the airplane at that time.

Any person who intentionally dispossesses another of chattel property without consent of the owner or possessor is liable as a converter for the value of the property, and this is true even though the person who takes the property from the owner or person in possession takes it under a mistaken [147] belief that he

is entitled to do so or has the consent of the owner, unless that mistaken belief was induced by the owner or person in possession. If you find by a preponderance of the evidence that the defendants took possession of the airplane described in the pleadings without the consent or agreement of the plaintiff, but because of a mistaken belief that they were entitled to use it, then your verdict should be for the plaintiff for such amount as you find the plaintiff justly entitled to receive under the evidence and these instructions. In such case the measure of damages is the reasonable worth and market value of the property, shown by the evidence, at the time of such taking and conversion.

The defendants, as you know, claim that they had the right to take and use the airplane under a charter or lease given them by the plaintiff. Such a delivery of a chattel from one person to another under the circumstances claimed by the defendants is known in law as a bailment. A bailment is a delivery of a thing in trust for some specific object or purpose and upon a contract expressed or implied to conform to the object or purpose of the trust. A bailment may otherwise be defined as a delivery of personal property for some particular purpose, or on mere deposit under contract, expressed or implied, that after the purpose has been fulfilled the property shall be re-delivered to the person who first delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. The person who delivers a personal chattel to another under circumstances coming within the definition of the term "bailment"

is called the bailor, and the person to whom such chattel has been delivered is called the bailee.

Under contract to let an airplane for hire it is the duty of the bailor to furnish an airplane reasonably fit and proper [148] for the use intended. Contract for rental of an airplane, and the consideration of payment of fixed amount, is a bailment for hire and is for the mutual benefit of both parties.

A contract of bailment, like any other contract, is an agreement between two or more persons, upon a sufficient consideration, to do or not to do a particular thing. The duration of a contract of bailment is to be determined from the terms of the contract itself. In this case if you find by a preponderance of the evidence that the parties mutually agreed that the defendants might take the airplane to the hangar of the Pacific Northern Airlines, Inc., for inspection purposes, but no more, and that no further contract was entered into between the parties, and you further find that the airplane was taken to the hangar of the defendant corporation and inspected and returned to its previous location, then the contract of bailment terminated upon the return of the airplane to its original location.

If you find that the defendants took possession of the airplane under an oral agreement with the plaintiff whereby the defendants were permitted to use the plane for air traffic and transport, for hire, and if you further find that the defendant Dorothy informed the plaintiff of the purpose for which the defendants were to use the airplane, then and in that event it was the duty of the plaintiff to furnish de-

fendants with an airplane suitable and adequate for the purposes agreed upon and upon furnishing the airplane under those circumstances, if they existed, there was an implied warranty by the plaintiff that the airplane was reasonably suitable and adequate for the purpose for which it was agreed the airplane should be used. [149]

If you find that the defendants took possession of the airplane under an agreed charter or lease at an agreed rental of \$35.00 per hour so that the contract was one of bailment for hire with the right of defendants to use the airplane, then and in such event the defendants would not be liable for damage to the airplane unless you further find that there was some negligence on the part of the defendants, or one of them, which directly contributed to the damage, for under those circumstances if there was no such negligence the loss must be borne by the bailor, who is the plaintiff in this action. It is for you to determine from all of the evidence whether the defendant was negligent in the care of plaintiff's airplane, and whether defendants acted in the care and protection of plaintiff's airplane as an ordinarily prudent person would have acted under the same or similar circumstances.

A bailee of personal property for hire is not an insurer of the safety of such personal property while under his control. By this is meant, that he is not liable merely because such personal property sustains an injury or is damaged. He is liable, if at all, because he had done some act or thing with reference to the care of such personal property which an

ordinarily prudent person similarly situated would not have done, or has failed to do some act or thing with reference to its care which an ordinarily prudent person, similarly situated would have done. In other words, a bailee of personal property for hire is required to exercise such ordinary care and diligence with reference to the caring for such property to prevent injury thereto while under his control that a person of ordinary prudence would have exercised in caring for property of the same kind, in the same situation and under the same or similar circumstances and conditions. He is required to exercise such ordinary care with reference to the property as an ordinarily [150] prudent person engaged in the same business would have exercised under similar circumstances and conditions.

However, a bailee for hire of personal property is bound to exercise ordinary and reasonable care in the use and possession of such property, and failure to exercise such care is negligence; and if the property is damaged by the negligence of the bailee, and if the negligence of the bailee is the direct and proximate cause of the damage, then the bailee is liable to the bailor for such damage. So in this case if you find that the oral agreement or contract between the parties was one of charter or lease for hire of the airplane at \$35.00 per hour, as alleged by the defendants, and if you further find that the airplane was wrecked or damaged as the proximate result of the negligence of the defendants, or either of them, then the plaintiff is entitled to recover for the damage sustained by such negligence. Where property is in the exclusive possession of a bailee for hire and is damaged in a

way that ordinarily does not occur without negligence, the burden of proof is upon the bailee to show that the injury was not occasioned by his negligence.

In the instructions heretofore given reference has been made to the rights and liabilities of the parties under a contract of bailment if any such contract existed between the parties in this case. The rights of the parties are entirely governed by the contract between them. If you find from a preponderance of the evidence that the averments of plaintiff's complaint are true and he permitted the defendants to take possession of the airplane only for the purpose of moving the same to the hangar of the defendant corporation so that it might be examined by the mechanics of said corporation and for no other purposes, [151] then the plaintiff is entitled to recover in this action because the contract of bailment between the parties under such circumstances would forbid the defendants from flying the plane or from moving it except to and from the hangar of the defendant corporation.

On the other hand, if you find the averments of the defendants' answers with respect to a charter or lease of the plane for hire at the stipulated rental of \$35.00 per hour are true, and that the defendants used said plane under such an agreement with the plaintiff, then and in that event the defendants would be liable for loss or damage to the plane only in case such loss or damage resulted from the negligence of the defendants or one of them, and by negligence is meant a lack of such ordinary care as an ordinarily prudent person would have exercised under similar circumstances. Accordingly, the first issue for you to

decide really is what the agreement was between the plaintiff and the defendant Dorothy as to the use, if any, which Dorothy and the defendant corporation might make of the plaintiff's airplane.

If you determine that the averments of the plaintiff's complaint with respect to the nature of the oral contract or agreement between the parties is true, then the plaintiff is entitled to recover without regard to negligence or lack of negligence on the part of defendants in operating the airplane.

But if you find that the oral agreement of the parties was a bailment for hire at \$35.00 per hour under which the defendants were authorized to use the airplane, then you must determine whether or not the defendants were negligent in operating the airplane and whether that negligence, if any, was the proximate cause of damage to the airplane: for if the defendants were so negligent and if that negligence was the proximate cause of damage to the airplane, then the plaintiff [152] is deserving of a verdict at your hands, but if the defendants were not negligent under the circumstances last mentioned, namely, under a contract of hire of the airplane at \$35.00 per hour, or if the negligence of defendants, if any, was not the proximate cause of damage to the airplane, then the defendants are entitled to the verdict.

The term "proximate cause" has been used in these instructions. By proximate cause of damage is meant that act or omission, that cause, which in a natural, continuous, connected and unbroken operation, without any new and independent intervening cause, produces the damage complained of, and without which

the damage would not have occurred. An alleged act of negligence is the proximate cause of damage where the damage is the natural and probable result of the negligence, and where the damage would not have occurred except through such negligence.

The market value of the property at the time of its conversion is generally the measure of damage in an action such as this. You may take into consideration its worth a reasonable time before and subsequent to the time of the alleged conversion in this action.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce [153] conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence

was within the power of the party, the evidence offered should be viewed with distrust.

The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the [154] weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you, and the

inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone. [155]

Upon retiring to your jury room you will elect one of your members foreman who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, the pleadings and exhibits in the case,

and two forms of verdict which I have prepared for your use.

If you find for the plaintiff and against the defendants your foreman will insert in the appropriate place in your verdict which has been prepared for this contingency and which is marked Verdict No. 1, the amount which you find the plaintiff is entitled to recover from the defendants, not to exceed the sum of \$8,500.00, and your foreman will thereupon date and sign the verdict and return the same into court as your verdict.

If you find for the defendants and against the plaintiff then your foreman will date and sign the verdict which has been prepared for that contingency and which is marked Verdict No. 2, and return the same into court as your verdict.

The form of verdict not used will be destroyed by your foreman.

With your verdict you will return into court these instructions, the exhibits and the pleadings in the case.

Dated at Anchorage, Alaska, this 25th day of February, 1948.

And I have signed the same as District Judge.

Now, the counsel for the parties may come to the desk and take exceptions to the instructions given and those requested instructions which the Court declined to give, in order that, if the Court is wrong upon the law, an opportunity will be given to correct the error in the Court of Appeals.

(The following proceedings were had in the presence of the jury but not in the hearing of the jury.) [156]

The Court: Plaintiffs may tax exceptions first.

Mr. Kay: We have no exceptions to the instructions.

The Court: Do you have any exceptions to the failure of the Court to give the instructions you requested?

Mr. Kay: None.

The Court: Very well.

Mr. Kay: Pardon me, your Honor. I didn't check to see what instructions you failed to give.

The Court: You may look. And I will say to all counsel, if you overlook any exceptions you want to take you may come to the desk and take them any time before the jury retires.

Mr. Davis: I would like to suggest to the Court that you have a third form of verdict here to take care of the contingency we discussed in your chambers this morning about the jury possibly wanting to bring in a verdict for or against one of the defendants and not the other.

The Court: I took a hasty look at the text on the subject in *Ruling Case Law* and so far as I can tell the prevailing rule is that in the case of conversion the agent is bound as well as the principal. I may be mistaken.

Mr. Davis: I think that is good law only I don't think it is necessarily true. In other words, the jury may decide one is liable and not the other. As I told you in chambers this morning, I didn't feel as a matter of law you could say so, but I thought the jury might find the facts warranted holding one defendant liable and not the other.

Mr. Kay: I am afraid—I made the same hasty

check that you did, your Honor, and I was afraid that it would be reversible error if such a course were followed.

The Court: Well, if all of counsel agree to it I will give that instruction. That is, I will tell the jury if they find against one defendant but not the other, they may render a verdict accordingly, but if any of counsel here objects to the giving of that instruction I do not think I will give it. [157]

Mr. Manders: If the Court please, my feeling on that matter is the same as when we discussed it in chambers. I think you have to find as to both of them and not just one separately, because we couldn't be held without the action of the agent.

Mr. Davis: On behalf, then, of the defendant Dorothy, your Honor, I would like to except to the failure of the Court to set up a third form of verdict for that contingency, and also to so much of the last instruction as applied to the fact that two forms of verdict are given and that it is a joint verdict.

The Court: Exception will be noted.

Mr. Davis: On behalf, then, of the defendant Dorothy, I wish to except to the Court's failure to give requested instructions on behalf of defendants No. 1 through 21, inclusive, except insofar as they have been covered by the Court in the instructions as given.

The Court: The exceptions will be noted and each of the instructions submitted by the defendants will be marked "Refused except as covered by instructions given; exception noted." and will be signed and filed with the clerk this day. I think one instruction was copied verbatim. No. 8, I think, is copied

verbatim, but otherwise none of them was copied by adoption of the text to the language, although some of them have been covered in substance. All right, Mr. Davis?

Mr. Davis: I wish to except to that portion of Instruction No. 2——

Mr. Manders: Suppose I go along at the same time and I make the same exception on behalf of Pacific Northern Airlines.

The Court: Very well, exception will be noted on behalf of both defendants.

Mr. Kay: In other words, Mr. Manders is excepting to the failure of the Court to give a separate verdict? [158]

Mr. Manders: No, to failure to give our requested instructions.

The Court: Mr. Manders I understand, objects to any form of verdict whereby the jury might find against one of the defendants but not both.

Mr. Davis: I wish, then, to except to that part of Instruction No. 3 and 3-A which is a continuation of 3, which has to do with mistaken belief that he was entitled to take the property.

The Court: The exception will be noted.

Mr. Davis: ——for the reason, your Honor, that without something additional the jury may feel that because the plaintiff thought that he didn't have the contract here that there was no contract.

Mr. Manders: And Pacific Northern Airlines takes the same exception.

The Court: Exceptions will be noted on behalf of the defendants.

Mr. Davis: I would like to except, your Honor, on behalf of the defendant Dorothy to that portion

of Instruction No. 6-A, the latter portion of it, concerning "Where property is in the exclusive possession of a bailee for hire," and so forth, to the end of the instruction, on the ground there is no evidence to support that instruction.

Mr. Manders: And the same exception on behalf of Pacific Northern Airlines.

The Court: Exception will be noted on behalf of both defendants.

Mr. Davis: You have already covered, I think, my objections to Instruction No. 12 on the question of the separate verdict.

The Court: Exception will be noted.

Mr. Kay: I would respectfully like to except to failure to give such instructions as I have requested which were not given, your Honor.

The Court: Very well, as in the case of defendants' instructions, [159] exception will be noted and each of the instructions submitted by the plaintiff will be marked "Refused except as covered by instructions given. Exception noted." And will be signed by me and filed with the clerk, to become a part of the record upon appeal.

Mr. Kay: Thank you, your Honor.

Mr. Davis: Thank you, your Honor.

The Court: Court will stand in recess until 3:52.

(Whereupon recess was had at 3:42 o'clock p.m.)

(Following recess argument was had to the jury by the respective counsel.)

(Mr. W. B. Healy was duly sworn as bailiff in charge of the jurors, and at 5:01 o'clock p.m. the trial jury retired in charge of their sworn bailiff

to deliberate upon their verdict, it having been stipulated by and between respective counsel that a sealed verdict be returned at 10:00 o'clock a.m. of the following morning.)

(At 5:45 o'clock p.m., the following occurred:)

The Court: Roll may be called of the jurors in the box.

The Clerk: Mr. Walter Brown not here; all others present.

The Court: Ladies and gentlemen, as you know, Mr. Brown, one of your number, is ill and the doctor has recommended that he go to bed immediately. I have consulted with Mr. Cuddy, representing the plaintiff, and both Mr. Davis and Mr. Manders representing the defendants, and they have stipulated orally that the remaining 11 of you may return a verdict, and so you may proceed to your deliberations and return a verdict just the same as though you had 12 instead of 11.

You may now retire to consider of your verdict and court will stand adjourned until tomorrow morning at 10:00 o'clock.

(At 10:00 o'clock a.m. of Thursday, February 26, 1948, the jury, in open court, returned a verdict for the plaintiff and against the defendants and found that the plaintiff is entitled [160] to recover of and from the defendants the sum of \$7,500.00.)

The Court: Do counsel wish the jury polled?

Mr. Davis: Not I, your Honor.

Mr. Manders: Neither do I, your Honor.

The Court: Very well, the verdict may be received and filed and entered. The envelope may be filed.

Thank you for your service, ladies and gentlemen. You may now take your seats in the main body of the court room.

Mr. Manders: At this time, your Honor, I wish to make a motion for entry of judgment in favor of both defendants notwithstanding the verdict of the jury.

The Court: Do you wish to argue the motion?

Mr. Manders: We can argue it later, your Honor.

The Court: Very well. The fact that the motion has been made will be of record. It may be argued later. It may be put on the motion calendar to come up in regular order, unless counsel by stipulation or otherwise bring it up earlier.

* * * *

(On Friday, February 27, 1948. the following occurred:)

Mr. Cuddy: Your Honor, may I present just one item? Mr. Manders has asked that we enter into a stipulation in reference to the case just tried, but it is based upon a motion that he wishes to argue that he is not prepared to argue now. May we argue it Monday, or Tuesday?

The Court: Yes.

Mr. Manders: I prefer Tuesday.

Mr. Cuddy: Tuesday at 10:00 a.m.?

Mr. Manders: And my motion that the time within which to file motion for new trial be extended 10 days after the ruling of the Court on the motion for judgment notwithstanding the verdict.

The Court: Is there any objection?

Mr. Cuddy: No. [161]

The Court: Very well, minute order may be made accordingly. The minute order is that the motion for

judgment notwithstanding the verdict will be argued at 10:00 o'clock on Tuesday morning and that the time for filing motion for new trial is extended until 10 days after that date.

Mr. Manders: After the ruling on the motion.

The Court: After the ruling on the motion for judgment notwithstanding the verdict.

The Court thereafter made and had entered the following minute orders denying the motion for judgment notwithstanding the verdict:

“Now at this time upon oral motion of John E. Manders, of counsel for defendant and with W. W. Cuddy, of counsel for plaintiff not objecting thereto,

It Is Ordered that the time for filing motion for new trial in Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, be, and it is hereby, extended to 10 days after decision of motion re judgment notwithstanding verdict.”

“Now at this time hearing on oral motion re judgment notwithstanding verdict in Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, came on regularly before the Court, the plaintiff not being present but represented by Wendell P. Kay, of his counsel, the defendants not being present but represented by John E. Manders. The following proceedings were had, to-wit:

Argument to the Court was had by John E. Manders, for and in behalf of both defendants, Don

Dorothy and Pacific Northern Airlines, Inc., a corporation.

No argument by plaintiff.

Whereupon the Court having heard the argument of respective counsel and being fully and duly advised in the premises, overruled motion."

Thereafter defendants made their motion for a new trial, and said motion reading as follows:

"MOTION FOR A NEW TRIAL

"Come now the defendants above-named and move this Honorable Court for an order setting aside and vacating the verdict and judgment of the jury heretofore rendered and entered in favor of the plaintiff and against the defendants in the above-entitled action, and feeling aggrieved by such verdict and judgment move that a new [162] trial of said action be granted to said defendants for the following causes alleged by defendants as materially effecting their substantial rights and the rulings of the court which were prejudicial to their substantial rights, to-wit:

Errors in law occurring at the trial and excepted to by the defendants:

1. The court erred in overruling the respective demurrers of defendants to the complaint of plaintiff on file herein.

2. The court erred in denying defendants' motion at the close of plaintiff's case to grant a non-suit on the ground that plaintiff had failed to prove a case as laid in his complaint.

3. The court erred in denying defendants' motion at the close of plaintiff's case to grant a directed ver-

dict on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded, and that plaintiff had failed to show any conversion of the property, the subject matter of his complaint.

4. The court erred in again denying defendants' motion for a non-suit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint.

5. The court erred in again denying defendants' motion for a directed verdict at the close of the case on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of said complaint.

6. The court erred in denying defendants' motion for a judgment notwithstanding the verdict on the ground that plaintiff had failed to prove a case as laid in his complaint and further that plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein and that plaintiff had not shown any conversion of the property, the subject matter of plaintiff's complaint.

Wherefore, defendants move said court to grant a new trial in the above-entitled action.

Dated this 3rd day of March, 1948.

/s/ EDWARD V. DAVIS,
Attorneys for Defendant, Don Dorothy.

/s/ JOHN E. MANDERS,
Attorney for Defendant, Pacific Northern Airlines,
Inc." [163]

And thereafter the Court made and entered its order denying defendants' motion for a new trial, which order reads as follows:

“No. A-4725 HEARING ON MOTION
FOR NEW TRIAL

Now at this time hearing on motion for new trial in Cause No. A-4725, entitled C. A. McCandless, plaintiff, versus Don Dorothy and Pacific Northern Airlines, Inc., a corporation, defendants, came on regularly before the Court, the plaintiff not being present but represented by Wendell P. Kay, of his counsel, the defendants not being present but represented by John E. Manders, of their counsel. The following proceedings were had, to-wit:

Argument to the Court was had by John E. Manders, for and in behalf of the defendants.

Whereupon the Court, having heard the argument of respective counsel and being fully advised in the premises, denied motion for new trial.

Thereafter on the 11th day of May, 1948, the term of the Court was extended to and including the 8th day of July, 1948, within which to present, settle and allow the Bill of Exceptions, and perfect the Appeal of defendants in said action, by its order signed and filed on said day. Thereafter said Court by its order duly given, made and filed on the 5th day of June, 1948, extended the time for filing of the record and docketing said action in the U. S. Court of Appeals, to and including the 15th day of July, 1948.

Thereafter and on June 24, 1948, the time of the defendants to file their proposed Bill of Exceptions

in said action was by an order of said Court, signed and filed on said day, extended to and including the 23rd day of August, 1948. Thereafter, on July 8, 1948, the Court by its order, signed and filed on said day, extended the term of said Court for the purpose of presentation, settlement and allowance of the Bill of Exceptions herein to and including the 8th day of September, 1948.

Thereafter and on the 15th day of July, 1948, by its order signed and filed on said day, the time for filing the record and docketing the cause in the United States Court of [164] Appeals for the Ninth Circuit was extended to and including the 13th day of September, 1948.

Thereafter and on the 23rd day of August, 1948, by its order, signed and filed on that date, the time of defendants to file their proposed Bill of Exceptions was extended to and including the 22nd day of October, 1948.

Thereafter on the 1st day of September, 1948, by its order, signed and filed that day, the time for filing the record and docketing this cause in the United States Court of Appeals for the Ninth Circuit was extended to and including the 1st day of November, 1948, and on said date, said Court, by its order, signed and filed on said date, extended the term of said Court for the purpose of presentation, settlement and allowance of Bill of Exceptions to and including the 1st day of November, 1948.

Thereafter on the 21st day of October, 1948, by its order, signed and filed on said day, the time of defendants to file their Bill of Exceptions was extended to and including the 1st day of November, 1948.

Thereafter on the 1st day of November, 1948, by its order, signed and filed on said day, the time for filing the record and docketing the cause in the United States Court of Appeals for the Ninth Circuit was extended to and including the 1st day of December, 1948, and on said 1st day of November, 1948, the Court by its order, signed and filed on said day, extended the term of said court for the presentation, settlement and allowance for Bill of Exceptions to and including the 1st day of December, 1948.

Thereafter on the 30th day of November, 1948, the Court by its order, signed and filed on said day, extended the term of said Court for the purpose of presentation, settlement and allowance of Bill of Exceptions to and including the 1st day of December, 1948. Thereafter on said day the Court, by its order, signed and filed on said day, extended the time for [165] filing the record and docketing the cause in the United States Court of Appeals, for the Ninth Circuit, to and including the 31st day of December, 1948.

Thereafter on the 31st day of December, 1948, the Court by its order, signed and filed on said day, extended the term of said Court to and including the 31st day of January, 1949, in which to present, settle and allow the Bill of Exceptions and perfect the Appeal of defendants in said action to and including the 31st day of January, 1949. That on said day said Court, by its order signed and filed on said day, extended the time of defendants to present and file their Bill of Exceptions to and the 31st day of January, 1949. That on said day said Court, by its order, signed and filed on said day, extended the time of

defendants for filing of the record and docketing the cause in the United States Court of Appeals, for the Ninth Circuit, to and including the 31st day of January, 1949.

Thereafter and on the 31st day of January, 1949, the Court, by its order, signed and filed on said day, extended the term of said Court for the purpose of presentation, settlement and allowance of Bill of Exceptions to and including the 28th day of February, 1949. That on the said 31st day of January, 1949, the Court, by its order, signed and filed on said day, extended the time of defendants to file their Bill of Exceptions in said cause to and including the 28th day of February, 1949. That on said 31st day of January, 1949, said Court, by its order, signed and and filed on said day, extended the time for filing of the record and docketing of the cause in the United States Court of Appeals, for the Ninth Circuit, to and including the 28th day of February, 1949.

Thereafter on the 26th day of February, 1949, the Court by its order, signed and filed on said day, extended the time of defendants for filing of the record and docketing the cause in the United States Court of Appeals, for the Ninth Circuit, to and including the 1st day of April, 1949. [166]

That on February 26, 1949, the Court, by its order, signed and filed on said day, extended the time of defendants in which to file their proposed Bill of Exceptions to and including the 15th day of March, 1949. That said Court on the 26th day of February, 1949, by its order, signed and filed on said day, extended the term of the Court for the purpose of presentation, settlement and allowance of defend-

ants' Bill of Exceptions to and including the 15th day of March, 1949.

The matters and things hereinabove in this Bill of Exceptions set forth not fully appearing in the record, the said defendants, Don Dorothy and Pacific Northern Airlines, Inc., a corporation, tender and present the foregoing as their Bill of Exceptions in said cause, and pray that the same be settled, allowed, signed and sealed, and made a part of the record in said cause by this Court pursuant to law in such cases.

Dated at Anchorage, Alaska, this 15th day of March, 1949.

.....,
Attorney for Defendant, Pacific Northern Airlines,
Inc.

.....,
Attorneys for Defendant, Don Dorothy.

Service admitted this 14th day of March, 1949.

.....,
Attorneys for Plaintiff. [167]

(Following are the Instructions requested on behalf of the defendants, which were filed with the Clerk of the District Court February 25, 1948, and each of which was subsequently marked: "Refused except as covered by instructions given. Exception noted," and signed by Anthony J. Dimond, District Judge:)

Defendant's Instruction No. 1

A mere detention of another's chattels which rightfully came into one's possession is not an actionable conversion. If, however, the detention be based upon

a negation of the owner's rights, or be accompanied by an intent to convert the property to the holder's own use, a right of action will arise.

Defendant's Instruction No. 2

The jury are instructed that, if you believe from the evidence that the airplane in controversy was hired by the plaintiff, to Pacific Northern Airlines, the defendant, to be used by the latter, and that they were mutually benefitted by the arrangement, then defendant was only required to use such care as ordinarily prudent men take of their property in taking care of the airplane, and if the jury further believes from the evidence that the defendant used such care and diligence in taking care of the airplane, you will find for the defendant.

Defendant's Instruction No. 3

You are instructed that the defendant in this case, in any event, was only bound to use ordinary care in the care of the airplane, and was bound only to take such precautions and adopt such safeguards as an ordinary prudent person would adopt to protect his own property.

Defendant's Instruction No. 4

Bailee of an airplane for the mutual benefit of the bailor and bailee did not become liable as an insurer for any damage that the airplane might sustain while in its [168] possession, but only for failure to exercise ordinary care.

Defendant's Instruction No. 5

Any distinct act or dominion wrongfully exerted

over one's property in denial of his right, or inconsistent with it, is a conversion.

Defendant's Instruction No. 6

The assertion of a title to or of dominion over personal property inconsistent with the right of the owner constitutes a conversion.

Defendant's Instruction No. 7

A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property.

Defendant's Instruction No. 8

A bailee of personal property for hire is not an insurer of the safety of such personal property while under his control. By this is meant, that he is not liable merely because such personal property sustains an injury or is damaged. He is liable, if at all, because he had done some act or thing with reference to the care of such personal property which an ordinarily prudent person similarly situated would not have done, or has failed to do some act or thing with reference to its care which an ordinarily prudent person, similarly situated, would have done. In other words, a bailee of personal property for hire is required to exercise such ordinary care and diligence with reference to the caring for such property to prevent injury thereto while under his control that a person of ordinary prudence would have exercised in caring for property of the same kind, in the same situation and under the same or similar circumstances and conditions. He is required to exercise such ordinary care with reference to the property as an ordinarily prudent person engaged in the same

business would have exercised under similar circumstances and conditions. [169]

Defendant's Instruction No. 9

The court instructs you that a bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may it.

The person who delivers a personal chattel or chattels to another under circumstances coming within the definition of the term bailment is called the bailor, and the person to whom such such chattel or chattels have been delivered is called the bailee.

Defendant's Instruction No. 10

Where a contract of bailment of property is for the mutual benefit of the bailor and the bailee, the bailee is only bound to use reasonable and ordinary care to protect the property.

Defendant's Instruction No. 11

The court instructs you that a "bailment" may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.

The person who delivers a personal chattel or chattels to another under circumstances coming within

the definition of the term "bailment" is called the "bailor" and the person to whom such chattel or chattels have been delivered is called the "bailee".

Defendant's Instruction No. 12

Where a contract of bailment of property is for the [170] mutual benefit of the bailor and the bailee, the bailee is only bound to use reasonable and ordinary care to protect the property.

Where property in the custody of a bailee is accidentally damaged or destroyed, without any negligence on the part of the bailee causing the same, the bailee is not liable for such loss, but the loss must be borne by the bailor. It is for you to determine, however, from all the evidence in the case, whether defendant was negligent in the care of plaintiff's aeroplane and whether defendant or its agents acted in the care and protection of plaintiff's aeroplane as an ordinarily prudent person would have acted under the same or similar circumstances.

Defendant's Instruction No. 13

The court instructs you that if the defendant informed the plaintiff of the purpose for which it was to use the airplane, and trusted the plaintiff to furnish them with an airplane suitable and adequate for such purpose, and the plaintiff understood to do this, and thereupon furnished this airplane for that purpose, there was an implied warranty by the plaintiff that the airplane was reasonably suitable and adequate for the purpose for which it was agreed upon.

Defendant's Instruction No. 14

Custody distinguished—Letting of chattel for hire constitutes "bailment" under which bailor retains general ownership and bailee has possession as distinguished from mere custody and where chattel is let for hire, bailee acquires, against strangers at least, special property in the subject of bailment.

Defendant's Instruction No. 15

Contract for rental of an airplane, and consideration of payment of fixed amount is a "bailment for hire," and hence for mutual benefit for both.

Defendant's Instruction No. 16

"Under contract to let airplane for hire, it is the duty of the bailor to furnish an airplane reasonably fit and proper for the use intended."

Defendant's Instruction No. 17

A "bailment" is the delivery of a thing in trust for some specific object or purpose and upon a contract expressed or implied to conform to the object or purpose of the trust.

Defendant's Instruction No. 18

The measure of damages for conversion is market value of the property at time and place of conversion, but if returned, value at time of return is deducted.

Defendant's Instruction No. 19

If you find that this property has a market value at the time and place of conversion, that would be the measure of damages.

The general rule is well established that the market value of the property at the time and place of conversion of personal property is the proper measure of damages.

Defendant's Instruction No. 20

The value of the property at the time of its conversion is generally the measure of damage in an action of trover. You may take into consideration its worth a reasonable time before and subsequent to the time of the alleged conversion in this action.

Defendant's Instruction No. 21

If you find that an agreement of rental or charter for the use of the airplane involved in this action was entered into then, and in that event, judgment should be in favor of defendants.

[Endorsed]: Filed March 15, 1949. [172]

[Title of District Court and Cause.]

STIPULATION SETTLING BILL OF
EXCEPTIONS

It is hereby stipulated and agreed by and between counsel for plaintiff and defendants above named, that the foregoing statement of the testimony introduced at the trial of the above-entitled action, together with the motions therein referred to and rulings thereon, is a true, correct and accurate statement thereof.

It Is Further Stipulated and Agreed that Bill of Exceptions may be approved and settled as the Bill

of Exceptions immediately and without further notice.

Dated at Anchorage, Alaska, this 14th day of March, 1949.

/s/ WENDELL P. KAY,
Attorney for Plaintiff.

/s/ EDWARD V. DAVIS,
Attorney for Defendant,
Don Dorothy.

/s/ JOHN E. MANDERS,
Attorney for Defendant, Pacific Northern Air-
lines, Inc.

[Endorsed]: Filed March 15, 1949. [173]

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The defendants in the above-entitled action having applied to the Court for an order approving the foregoing Bill of Exceptions in the above-entitled action, and plaintiff and defendants by and through their respective counsel having stipulated that said Bill of Exceptions is a true, correct and accurate statement of all the testimony introduced in the trial of said cause and all the motions made and the Court rulings thereon, and having stipulated that said Bill of Exceptions may be approved and settled as the Bill of Exceptions in said cause without further notice; and

It further appearing that said Bill of Exceptions contains a statement of the evidence in said cause,

and is complete and correct, and said Bill of Exceptions, motions made therein and the Court's rulings thereon, is complete and correct, and said Bill of Exceptions having been heretofore presented to the Court for settlement within the time allowed by law and the rules of this Court, and the Court being fully advised in the premises, it is therefore

Ordered, that the foregoing Bill of Exceptions be, and the same hereby is approved and settled as the Bill of Exceptions in the above-entitled cause upon appeal of the [174] defendants to the United States Court of Appeals for the Ninth Circuit; and it is

Further Ordered, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court who presided at the hearing of said cause and before whom in said cause the testimony was given, motions made and the Court's rulings thereon, and that the said Bill of Exceptions contains a full statement of all the evidence in said cause and upon which judgment therein is based.

Dated this 15th day of March, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered Court Journal No. G 18, Page No. 263,
Mar. 15, 1949.

[Endorsed]: Filed March 15, 1949. [175]

[Title of District Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT
OF RECORD

To the Clerk of the District Court, Third Division,
Territory of Alaska:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an Appeal taken in the above-entitled cause, and to include in said transcript of record, the following papers of record in said cause, to-wit:

1. Complaint.
2. Demurrer of Don Dorothy.
3. Demurrer of Pacific Northern Airlines, Inc.
4. Minute Order Overruling Demurrers of Defendants.
5. Answer of Don Dorothy.
6. Answer of Pacific Northern Airlines, Inc.
7. Reply to Answer of Don Dorothy.
8. Reply to Answer of Pacific Northern Airlines, Inc.
9. Minute Order Denying Motion for Nonsuit and Directed Verdict.
10. Minute Order Denying Motion for Judgment Notwithstanding Verdict.
11. Judgment.
12. Motion for New Trial. [176]
13. Minute Order Denying Motion for New Trial.
14. Petition for Appeal.

15. Order Allowing Appeal and for Supersedeas.
16. Citation on Appeal.
17. Assignments of Error.
18. Supersedeas and Cost Bond.
19. Acknowledgment of Service of Petition for Appeal, Order Allowing Appeal and Supersedeas, Citation on Appeal, Assignments of Error, Supersedeas and Supersedeas and Costs Bond.
20. Bill of Exceptions filed March 15, 1949.
21. Stipulation for Settlement of Bill of Exceptions.
22. Order Settling Bill of Exceptions.
23. This Amended Praecipe dated March 17, 1949.

Respectfully,

/s/ JOHN E. MANDERS,

Attorney for Defendant, Pacific Northern Airlines,
Inc.

EDWARD V. DAVIS,

Attorney for Defendant,
Don Dorothy.

Service admitted this 17th day of March, 1949.

/s/ W. N. CUDDY,

Attorney for Plaintiff.

[Endorsed]: Filed March 17, 1949. [177]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska, Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 177 pages, numbered from 1 to 177, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the stipulation for praecipe filed in my office on the 2nd day of August, 1944; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$27.80, has been paid to me by John E. Manders, counsel for the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 20th day of April, 1949.

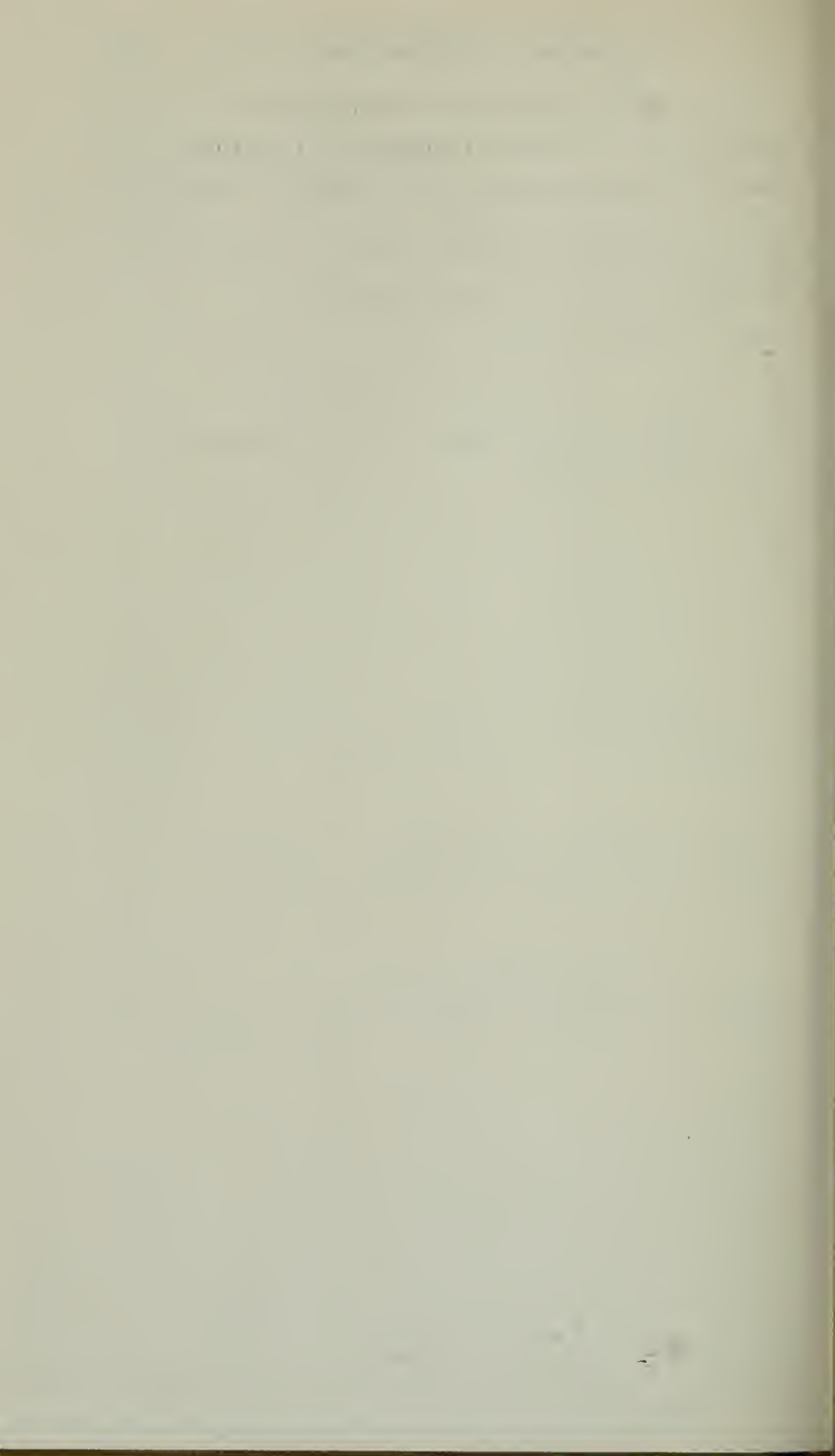
[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division.

[Endorsed]: No. 12230. United States Court of Appeals for the Ninth Circuit. Don Dorothy and Pacific Northern Airlines, Inc., a Corporation, Appellant, vs. C. A. McCandless, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed April 23, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.



No. 12,230

IN THE

United States Court of Appeals
For the Ninth Circuit

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC., (a corporation),

Appellants,

VS.

C. A. McCANDLESS,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

JOHN E. MANDERS,

EDWARD V. DAVIS,

Anchorage, Alaska,

Attorneys for Appellants.

FILED

OCT 16 1949

PAUL P. O'BRIEN,
CLERK



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IN THE
United States Court of Appeals
For the Ninth Circuit

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC., (a corporation),

Appellants,

vs.

C. A. McCANDLESS,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

STATEMENT OF BASIS FOR JURISDICTION.

On October 6, 1947, C. A. McCandless, the appellee above named, commenced this action in the District Court for the Territory of Alaska, Third Division, against Don Dorothy and Pacific Northern Airlines, Inc., a corporation, appellants above named, to recover from them \$8,500.00 damages by reason of an alleged conversion of an airplane by appellants for their use on September 6, 1947, between Anchorage, Alaska, Kasilof and Kenai, Alaska.

The District Court for the Territory of Alaska is a court of general jurisdiction. The Act of June 6,

1900, 31 Stat., L. 321, as amended 35 Stat., L. 839, 840, Compiled Laws of Alaska, 1933, Sec. 1091, insofar as here material, reads as follows:

“There is established a District Court for the Territory of Alaska * * * with general jurisdiction in * * * civil causes.”

The defendants demurred to plaintiff's complaint on the grounds:

1. That said complaint did not state facts sufficient to constitute a cause of action; and

2. That said complaint did not state facts sufficient to constitute a cause of action against defendants. (Tr. 5, 6.) Said demurrers were overruled. (Tr. 7.)

Thereupon defendants filed their answers, (Tr. 7, 12) and a reply was filed by plaintiff. (Tr. 16, 17.) Trial was had before a jury, which returned its verdict in favor of plaintiff and against defendants for the sum of \$7,500.00. (Tr. 21.)

At the close of plaintiff's case, defendants moved for a nonsuit based on the ground that the plaintiff had failed to prove his case as laid, and for a directed verdict on the ground that the plaintiff had failed to sustain the allegations of his complaint as to the relief demanded and had not at that time shown any conversion of the property referred to in the complaint. (Tr. 19, Tr. 18.)

After the jury returned its verdict, the defendants moved the court for judgment notwithstanding the verdict of the jury. (Tr. 20.) This motion was denied

by the court. (Tr. 20.) Defendants filed their motion for a new trial and the same was denied. (Tr. 25.)

This appeal followed, and this court has jurisdiction by virtue of the provisions of Sec. 225, Vol. 28, U.S. C.A., (Judicial Code, Sec. 128) as amended, the pertinent parts of which are:

“The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions * * *

Third. In the district courts for Alaska or any division thereof, * * * in all cases, * * *”

STATEMENT OF THE CASE.

Plaintiff's complaint was filed on October 6, 1947, and alleges briefly that plaintiff was at all times mentioned in the complaint the owner of a Stinson Aircraft NC-18411, said aircraft being a Stinson SR-9 type, equipped with a 450 horse power Pratt & Whitney engine; that at all times mentioned in the complaint, Don Dorothy, the co-defendant, was an employee and agent of defendant, Pacific Northern Airlines, Inc., a corporation; that on or about the 4th day of September, 1947, the defendant Don Dorothy represented to the plaintiff that he was the representative of and acting on behalf of co-defendant, Pacific Northern Airlines, and that Don Dorothy negotiated with the plaintiff for the purchase of the above described aircraft, and plaintiff claimed that defendant Don Dorothy and plaintiff verbally agreed that said aircraft could be taken by co-defendant Don Dorothy

to the Pacific Northern Airlines hangar located at Merrill Field, Anchorage, Alaska, for the purpose of inspection by employees of Pacific Northern Airlines and that later on defendant Don Dorothy wrongfully and unlawfully took said aircraft on the 6th day of September, 1947, and converted said aircraft to defendants' use between the towns of Anchorage, Kasilof and Kenai, Alaska; that while so flying the aircraft, defendant Don Dorothy totally destroyed it.

To this complaint defendants filed their respective demurrers, the same being overruled, after which defendants filed their answers and affirmative defenses. Said affirmative defenses alleged that the defendant Don Dorothy, for and on behalf of defendant Pacific Northern Airlines, had entered into a charter agreement with plaintiff for the use of said aircraft at \$35.00 per hour, and that defendant Don Dorothy, acting for and on behalf of Pacific Northern Airlines, took possession of said aircraft under said charter agreement and landed the aircraft on the beach at Kenai, Alaska; that during the landing of the aircraft on said beach the right wheel of said aircraft became locked, causing certain damage to the aircraft; that the beach selected by defendant Don Dorothy for landing was in good condition, and that the damage done to said aircraft was through no fault of defendant Don Dorothy, but was due to mechanical failure of the brake; that the defendant Don Dorothy at all times used reasonable precaution in flying and landing said aircraft, and further that neither defendant Don Dorothy nor Pacific Northern

Airlines was responsible in any manner for the damage which occurred to plaintiff's aircraft. To this complaint plaintiff's reply was filed and the case was tried.

SPECIFICATIONS OF ERRORS RELIED ON.

1. The court erred in overruling the respective demurrers of defendants to the complaint of plaintiff on file herein. (Tr. 29.)

2. The court erred in denying defendant's motion at the close of plaintiff's case to grant a nonsuit on the ground that plaintiff had failed to prove a case as laid in his complaint. (Tr. 29.)

3. The court erred in denying defendant's motion at the close of plaintiff's case to grant a directed verdict on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded, and that plaintiff had failed to show any conversion of the property, the subject matter of his complaint. (Tr. 29.)

4. The court erred in again denying defendants' motion for a nonsuit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint. (Tr. 29.)

5. The court erred in again denying defendants' motion for a directed verdict at the close of the case on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded therein, and that plaintiff had not shown any con-

version of the property, the subject matter of said complaint. (Tr. 30.)

6. The court erred in denying defendants' motion for a judgment notwithstanding the verdict on the ground that plaintiff had failed to prove a case as laid in his complaint, and further that plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of plaintiff's complaint. (Tr. 30.)

7. The court erred in refusing to instruct the jury as follows (Tr. 199-205):

DEFENDANTS' INSTRUCTION No. 1

A mere detention of another's chattels which rightfully came into one's possession is not an actionable conversion. If, however, the detention be based upon a negation of the owner's rights, or be accompanied by an intent to convert the property to the holder's own use, a right of action will arise.

DEFENDANTS' INSTRUCTION No. 2

The jury is instructed that, if you believe from the evidence that the airplane in controversy was hired by the plaintiff, to Pacific Northern Airlines, the defendant, to be used by the latter, and that they were mutually benefited by the arrangement, then defendant was only required to use such care as ordinarily prudent men take of their property in taking care of the airplane, and if the jury further believes

from the evidence that the defendant used such care and diligence in taking care of the airplane, you will find for the defendant.

DEFENDANTS' INSTRUCTION No. 3

You are instructed that the defendant in this case, in any event, was only bound to use ordinary care in the care of the airplane, and was bound only to take such precautions and adopt such safeguards as an ordinary prudent person would adopt to protect his own property.

DEFENDANTS' INSTRUCTION No. 4

Bailee of an airplane for the mutual benefit of the bailor and bailee did not become liable as an insurer for any damage that the airplane might sustain while in its possession, but only for failure to exercise ordinary care.

DEFENDANTS' INSTRUCTION No. 5

Any distinct act or dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion.

DEFENDANTS' INSTRUCTION No. 6

The assertion of a title to or of dominion over personal property inconsistent with the right of the owner constitutes a conversion.

DEFENDANTS' INSTRUCTION No. 7

A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property.

DEFENDANTS' INSTRUCTION No. 8

A bailee of personal property for hire is not an insurer of the safety of such personal property while under his control. By this is meant, that he is not liable merely because such personal property sustains an injury or is damaged. He is liable, if at all, because he has done some act or thing with reference to its care which an ordinarily prudent person, similarly situated, would not have done. In other words, a bailee of personal property for hire is required to exercise such ordinary care and diligence with reference to the caring for such property to prevent injury thereto while under his control that a person of ordinary prudence would have exercised in caring for property of the same kind, in the same situation and under the same or similar circumstances and conditions. He is required to exercise such ordinary care with reference to the property as an ordinarily prudent person engaged in the same business would have exercised under similar circumstances and conditions.

DEFENDANTS' INSTRUCTION No. 9

The court instructs you that a bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under contract, express

or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.

The person who delivers a personal chattel or chattels to another under circumstances coming within the definition of the term bailment is called the bailor, and the person to whom such chattel or chattels have been delivered is called the bailee.

DEFENDANTS' INSTRUCTION No. 10

Where a contract of bailment of property is for the mutual benefit of the bailor and the bailee, the bailee is only bound to use reasonable and ordinary care to protect the property.

DEFENDANTS' INSTRUCTION No. 11

The court instructs you that a "bailment" may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.

The person who delivers a personal chattel or chattels to another under circumstances coming within the definition of the term "bailment" is called the "bailor" and the person to whom such chattel or chattels have been delivered is called the "bailee".

DEFENDANTS' INSTRUCTION No. 12

Where a contract of bailment of property is for the mutual benefit of the bailor and the bailee, the bailee is only bound to use reasonable and ordinary care to protect the property.

Where property in the custody of a bailee is accidentally damaged or destroyed, without any negligence on the part of the bailee causing the same, the bailee is not liable for such loss, but the loss must be borne by the bailor. It is for you to determine, however, from all the evidence in the case, whether defendant was negligent in the care of plaintiff's airplane and whether defendant or its agents acted in the care and protection of plaintiff's airplane as an ordinarily prudent person would have acted under the same or similar circumstances.

DEFENDANTS' INSTRUCTION No. 13

The court instructs you that if the defendant informed the plaintiff of the purpose for which it was to use the airplane, and trusted the plaintiff to furnish them with an airplane suitable and adequate for such purpose, and the plaintiff understood to do this, and thereupon furnished this airplane for that purpose, there was an implied warranty by the plaintiff that the airplane was reasonably suitable and adequate for the purpose for which it was agreed upon.

DEFENDANTS' INSTRUCTION No. 14

Custody distinguished—Letting of chattel for hire constitutes "bailment" under which bailor retains

general ownership and bailee has possession as distinguished from mere custody and where chattel is let for hire, bailee acquires, against strangers at least, special property in the subject of bailment.

DEFENDANTS' INSTRUCTION No. 15

Contract for rental of an airplane, and consideration of payment of fixed amount is a "bailment for hire", and hence for mutual benefit for both.

DEFENDANTS' INSTRUCTION No. 16

"Under contract to let airplane for hire, it is the duty of the bailor to furnish an airplane reasonably fit and proper for the use intended."

DEFENDANTS' INSTRUCTION No. 17

A "bailment" is the delivery of a thing in trust for some specific object or purpose and upon a contract expressed or implied to conform to the object or purpose of the trust.

DEFENDANTS' INSTRUCTION No. 18

The measure of damages for conversion is market value of the property at time and place of conversion, but if returned, value at time of return is deducted.

DEFENDANTS' INSTRUCTION No. 19

If you find that this property has a market value at the time and place of conversion, that would be the measure of damages.

The general rule is well established that the market value of the property at the time and place of conversion of personal property is the proper measure of damages.

DEFENDANTS' INSTRUCTION No. 21

If you find that an agreement of rental or charter for the use of the airplane involved in this action was entered into, then, and in that event judgment should be in favor of defendants.

ARGUMENT.

Plaintiff's complaint does not state facts sufficient to constitute a cause of action, and does not state facts sufficient to constitute a cause of action against defendants, Pacific Northern Airlines, Inc. and Don Dorothy.

It is the contention of defendants that in order to state a cause of action against defendants that plaintiff must allege, not only ownership, but also *that he was entitled to possession of the chattel*, giving its value, and that on that date defendants wrongfully took and carried it away, refused to restore it on demand, and wrongfully deprived plaintiff of its possession and use to his damage in a specified sum. If any one of the above allegations are omitted, the complaint must fail.

In the case of *Williams v. Gray, Sheriff of Gallatin County*, (Mont.) 203 Pac. 524, 526, the court stated:

“The sufficiency of the complaint as to the demurrer must be determined without reference to subsequent pleadings or to the facts appearing in evidence.”

The first factor that must be determined without reference to anything but the complaint is: *Does the complaint state a cause of action, and does it state a cause of action against the defendants and each of them?*

The instant action is the common law action of trover, and as such the complaint must contain all the material allegations which were necessary at common law. This is well borne out by the case of *Byland v. Miller*, (Ky.) 13 Fed. Supp. 137, 138 (1), wherein Judge Ford stated:

“This is a common law action in trover, and the complaint for conversion must contain all the material allegations which were necessary at common law. 65 C.J. 74, Sec. 121.”

and further:

“While the petition in this case alleges a right of property in the chattels alleged to have been converted, there is no allegation of *possession or right of possession* in the plaintiff at the time of the alleged conversion. * * *

“The plaintiff seeks to sustain the sufficiency of his petition in this regard upon the authority of a statement made in 21 R.C.L. 678, Sec. 40, to the effect that in such cases the petition need only allege ownership, delivery to defendant, and the fact of conversion. This statement of the law

appears to be based only on the authority of the single case of *Austin v. Vanderbilt*, 48 Or. 206, 85 P. 519, 6 L.R.A. (N.S.) 298, 120 Am. St. Rep. 800, 10 Ann. Cas. 1123. An examination of that case discloses that the court was considering the sufficiency of the petition after judgment, and hence leaves it somewhat doubtful as to whether it supports the broad statement of this text. Even if it does, it appears to be contrary to the prevailing weight of authority on the subject. *That mere right of property in a chattel will not support an action in trover without an allegation of either actual possession or a showing of some fact disclosing the plaintiff's right to immediate possession at the time of the alleged conversion seems to be settled by numerous authorities.* 65 C.J. p. 58, 'Sec. 93, and p. 79, Sec. 130. A discussion of the point is found in the case of *Lexington & O. R. Co. v. Kidd*, 7 Dana (Ky.) 245, 246. See, also, *Gentry v. Billing* (C.C.A.) 73 F. (2d) 925; *United States v. Loughrey*, 172 U.S. 206, 19 S.Ct. 153, 43 L.Ed. 420; *Kennett v. Peters*, 54 Kan. 119, 37 P. 999, 45 Am. St. Rep. 274; 26 R.C.L. pp. 1131, 1132, Sec. 41.

For the reasons stated, I am of the opinion that the demurrer should be sustained." (Italics ours.)

There is no allegation anywhere in plaintiff's complaint that he was entitled to the possession of said airplane.

In the case of *Gentry v. Billing*, (9th Cir. Cal.) 73 Fed. (2d) 925, 927, the court stated, in adopting the opinion prepared by Judge Mack prior to resubmission of the case:

“Trover is essentially a possessory action; plaintiff must allege and prove that at the time of the alleged conversion he either had the actual possession of the property or was the owner thereof and as such entitled to its immediate possession. *General Motors Acceptance Corp. v. Dallas*, 198 Cal. 365, 245 P. 184 (1926).”

In the case of *General Motors Acceptance Corp. v. Dallas*, 245 Pac. 184, 186, the court, speaking through Judge Lawler, stated:

“As this is an action in *conversion*, and not one in replevin, as assumed by the District Court of Appeal, it was incumbent upon the appellant to sustain the affirmative of the issue and prove either ownership and the right of possession or actual possession of said automobiles in itself at the time of the alleged conversion thereof. *Green v. Burr*, 63 P. 360, 131 Cal. 236, 238; *Zaro v. Dakan*, 18 P. 680, 76 Cal. 565, 566, and 567; *Moody v. Goodwin*, 200 P. 733, 53 Cal. App. 693, 694; *Brinkley-Douglas Fruit Co. v. Silman*, 166 P. 371, 33 Cal. App. 643, 651; 24 Cal. Jur. pp. 1025 and 1043. If the appellant failed to prove either that it was the owner of the automobiles and entitled to their possession or that it was in the actual possession thereof when the alleged conversion took place, judgment was properly entered against it. The evidence clearly shows, as already indicated, that the appellant was *not* in the *actual* possession of the automobiles at the time of the asserted conversion. The burden therefore rested upon it of proving ownership and the right of possession in itself. To adopt appellant’s contention that the sheriff should have

introduced evidence at the trial to show a want of ownership in appellant within the meaning of the Motor Vehicle Act, and having failed so to do is now precluded from relying on that act, would, in effect, be to shift the burden of proof to the sheriff and make it necessary for him to prove a want of ownership in the appellant. It is plain, therefore, that the sheriff, at this time, may have recourse to the Motor Vehicle Act, or any other law, to sustain his contention that the appellant, in the absence of actual possession, utterly failed to meet the burden of proof resting upon it to shown ownership and right of possession in itself at the time of the asserted conversion.”

Appellants contend that the same principle of law is involved in this case as in *U. S. v. Loughrey*, 43 L.Ed. 420, 172 U.S. 206, which was an action brought to recover the value of timber cut from lands in the State of Michigan. On page 421, the court said:

“To entitle the plaintiff to recover in this action, which is substantially in trover, it is necessary to show a general or special property in the timber cut, *and a right to the possession of the same* at the commencement of the suit. * * *

Although, as was said by Lord Kenyon in *Ward v. Macauley*, 4 T.R. 489, ‘the distinction between the actions of trespass and trover is well settled; the former are founded on possession; the latter on property;’—yet they are concurrent remedies to the extent that, wherever trespass will lie for the unlawful taking and conversion of personal property, trover may also be maintained. The plaintiff is bound to prove a right of pos-

session in himself *at the time of the conversion*, and if the goods are shown to be in the lawful possession of another by lease or similar contract he cannot maintain trover for them." (Citations.) (Italics ours.)

There must be more than a mere allegation of ownership of a chattel to entitle one to recover for conversion. *There must be an allegation that the plaintiff is entitled to possession.* If the plaintiff in an action is not entitled to possession, it would be impossible to bring an action for conversion; hence that necessary and material allegation.

Certainly a man may be the owner of a chattel and not be entitled to possession of the same, and if he was not entitled to possession, he could not bring an action of conversion.

A complaint in conversion must allege that plaintiff is entitled to possession. See *Harvey v. Lidvall*, 87 Pac. 895, 896, (Ore.) where Judge Bean (later a Judge of the United States District Court) stated:

"It has been held that, in an action by a mortgagee after condition broken, to recover possession of the mortgaged property, or in trover for its wrongful conversion, it is sufficient for plaintiff to allege generally that he is the owner and entitled to the possession, without setting out the source of his title. *Reinstein v. Roberts*, 34 Or. 87, 55 Pac. 90, 75 Am. St. Rep. 564; *Mayes v. Stephens*, 38 Or. 512, 63 Pac. 760, 64 Pac. 319. And we think the complaint, in the case at bar, comes within this rule. It is alleged that plaintiff was the owner and in possession of the property

in controversy and entitled to such possession at the time of the alleged conversion by the defendant.”

The very allegation held sufficient in the foregoing case, is lacking in the case at bar, there being no allegation in the complaint in the instant case that at the time of the alleged conversion plaintiff was entitled to possession.

Defendants contend that the airplane once having lawfully come into their possession, plaintiff must allege in his complaint a demand for the return of the same before he can bring an action of conversion.

Whether demand must be alleged depends upon whether it is essential to a cause of action. In this case it is defendants' contention that by the failure to make a demand for the return of the chattel, it being lawfully possessed by defendants, no cause of action for conversion by plaintiff was stated in the complaint.

In the case of *Jeffries v. Pankow*, 229 Pac. 903, 904 (Ore.), the court stated:

“The plaintiff attempts to declare as for trover and conversion. It is said that he delivered the property to the defendant on July 7, 1920, of course with the understanding alleged. This being true, the defendant was in the lawful possession of the car by the consent of the plaintiff. The attempted declaration of trover and conversion is not laid in the cepit in this instance. If it lies at all, it must have been in the detinet. The difference between the two is that in the first the action is grounded on the unlawful taking of the

property without the consent of the owner. In the second instance it is based on unlawful detention, and before a cause of action will arise upon the detention of the property which has its origin in the consent of the plaintiff, it must appear that a demand was made for its return. * * *

We are considering at present only the sufficiency of the complaint without reference to any other writing in the record." (Italics ours.)

That is the situation with which we are now dealing. *Did the pleading state a cause of action?* Plaintiff's own complaint states that defendant Don Dorothy could lawfully take the airplane.

Again in the *Jeffries* case, *supra*, at page 905, the court said:

"In *Owens v. Weedman*, 82 Ill. 409, according to the syllabus it is said 'To maintain trover the plaintiff must show a tortious conversion of personal property, and that, at the time of such conversion, he had a right of property in the chattel converted, *and also had the possession thereof, or a right to its immediate possession.*'" (Italics ours.)

Plaintiff could certainly never contend that he had no opportunity to demand the return of said airplane, for by his own testimony (Tr. 42) he stated:

"I didn't see it done, but over at United Air-motive they told me he had come got the key and took the plane down to the hangar and took it up for a test flight, and I was pretty het up because he took it off the ground without permission, because he didn't have any cockpit check.

He might be a good flier, but I wouldn't let anybody take my plane off the ground unless I was with him the first time."

The testimony further shows (Tr. 43) that plaintiff had checked the plane on Thursday, Friday and Saturday, and that it was tied down on the line. He had plenty of time to make a demand for the return of said plane but he did not do so then or at any other time.

In the case of *Hanson, et al. v. Ostrander Ry. & Timber Co., et al.*, (Wash.) 265 Pac. 159, Chief Justice Mackintosh, speaking for the court, said:

"The amended complaint in this cause sought to recover damages to a house boat owned by the appellants and injured through the alleged negligence of the respondents. It also sought to recover the full value of the house boat under an allegation that the respondents had taken it into their possession, and that no portion of the boat or its contents had been returned to the appellants. Upon the trial, the court compelled the appellants to elect which cause of action they would proceed in, and, having chosen to proceed upon the theory of conversion, a nonsuit was granted at the close of the appellants' testimony.

On this appeal, the first point raised by the appellants is that the court was in error in compelling them to elect. As already indicated, the complaint stated two causes of action, and, the appellants having interpreted one of these causes of action as being one for conversion, there was no error in compelling the election.

The second point made by the appellants is that the court erred in dismissing the action for failure of proof. A review of the testimony confirms the opinion held by the trial court that there was no evidence from which a jury would be entitled to find as a fact that any of the acts done by the respondents amounted to a conversion of the appellants' property. From the evidence it is very doubtful whether the appellants produced any testimony showing that they were the owners of the property alleged to have been converted. But, aside from this the testimony clearly shows that the respondents did not take the property into their possession against the consent of the appellants, and the possession, having been rightful at its beginning, could not become wrongful until a demand for its return had been made and refused.

Finding no error in the conduct of this trial or in the result arrived at by the trial court, the judgment is affirmed."

In the case of *Guthrie v. Halloran*, (Mont.) 3 Pac. (2d) 407, 409, the court, speaking through Judge Galen, stated:

"Every unauthorized assumption of dominion over personal property in hostility to the right of the true owner is conversion. 2 Estes Pleadings by Boone (4th Ed.) Sec. 2100. And the detriment caused by the wrongful conversion is presumed to be the value of the property at the time of its conversion with interest from that time. Section 8689, Rev. Codes 1921. The questions to be tried in an action for conversion of personal property such as this relate to the ownership and right of

possession, and a wrongful taking by the defendants.

The district court was in error in not sustaining the defendants' motion for a nonsuit because of the plaintiff's failure to prove his case."

Appellants respectfully call to the court's attention that no motion of any kind or character, before, during or after the trial, that the pleadings be made to conform to the proof, was made by the plaintiff other than the substitution of the word "Kenai" for the word "Kasilof" in the complaint.

CONCLUSION.

It is apparent from the authorities herein cited to the court and the rules of law laid down therein, that the District Court was in error in failing to sustain appellants' demurrers, as well as failing to grant appellants' respective motions and requested instructions.

Dated, Anchorage, Alaska,
October 17, 1949.

JOHN E. MANDERS,
EDWARD V. DAVIS,
Attorneys for Appellants.

No. 12,230

IN THE

United States Court of Appeals
For the Ninth Circuit

DON DOROTHY and PACIFIC NORTHERN
AIRLINES, INC. (a corporation),

Appellants,

VS.

C. A. McCANDLESS,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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FILED

DEC 28 1943

PAUL P. O'BRIEN,



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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee accepts generally the jurisdictional statement of the appellants, with particular reference to the provisions of 28 U.S.C.A. Sec. 225 (Judicial Code, Sec. 128).

STATEMENT OF THE CASE.

The Pleadings.

Appellee filed his complaint on October 6, 1947, alleging briefly: (1) that he was at all times the owner of a certain Stinson SR-9 aircraft, (2) that appellant

Dorothy, acting as agent of the co-appellant Pacific Northern Airlines, entered into a verbal agreement with appellee, whereby Dorothy was permitted to take the aircraft to a hangar for the purpose of having it examined and inspected in order to determine its value, (3) that two days later, in violation of this agreement, appellants wrongfully and unlawfully took possession of the aircraft and converted it to their own use by flying it to several towns and using it in the hauling of passengers and freight, (4) that while so engaged with the plane, appellants wrecked the aircraft and totally destroyed it, (5) that appellee has demanded the sum of \$8,500.00 from the appellants, which was the reasonable value of the aircraft at the time of the conversion. (Tr. 2-5.)

The appellants, after their demurrers were overruled, answered separately, but their answers are substantially to the same effect. They deny any wrongful taking of the aircraft, or that its value was \$8,500; they allege that they were entitled to the possession of the aircraft by reason of a rental agreement with appellee, and maintain that the plane was wrecked by reason of a mechanical failure of the brakes on landing, without negligence on their part in any manner. (Tr. 6-16.) The replies filed by appellee denied the existence of any rental or charter agreement, as well as the other allegations of the answers. (Tr. 16-18.)

The Evidence.

On September 4, 1947, appellee was engaged in working on his automobile parked near his trailer res-

idence, when he received a visit from appellant Dorothy. (Tr. 39-40.) Dorothy, a pilot for appellant Pacific Northern Airlines, testified that he had been instructed by the chief pilot to see if he could find an aircraft to rent for a few days, and that investigation had led him to appellee as the owner of a suitable plane. (Tr. 95-97.)

The evidence is conflicting as to the conversation which actually took place between the two men. Appellee's version is that Dorothy was primarily interested in purchasing the aircraft; that they discussed the plane and its value, and that he agreed to permit Dorothy to taxi the aircraft over to the Pacific Northern hangar for a mechanical inspection; there was some discussion of a possible rental agreement, but no definite agreement for rental or charter was reached. (Tr. 39-40, 49-50.) Appellee's version of the conversation was confirmed by his daughter, Grace, who overheard the conversation from the trailer a few feet away. (Tr. 65-66.) On the other hand, Dorothy maintained that he had entered into a definite rental or charter agreement with appellee, whereby Pacific Northern Airlines was to have the right to use the plane at a rate of \$35.00 per hour. He admitted there had been some mention of a possible purchase of the aircraft during the conversation. (Tr. 95-97.)

On the following day, Dorothy taxied the plane over to the hangar, where the Pacific Northern mechanics gave it a thorough inspection. Later in the same day he returned the plane to the "line", tied

it down, and left the keys at another hangar which had been designated by appellee. (Tr. 97-98.) Two days later, Dorothy again took the ship, loaded it with freight and mail and flew it to Kenai. At Kenai, he began to make a series of trips between the Kenai field and the Libby cannery beach; on the second beach landing the right wheel of the plane "dug in" after the plane rolled about one hundred feet; the aircraft flipped over to the right in the mud and was totally destroyed by the incoming tide. (Tr. 98-101, 45.) There was conflicting testimony as to whether the particular aircraft involved was a safe plane to use in such beach operations. Raymond I. Peterson, an airline operator in the Territory for nearly 14 years, testified that he did not consider this Stinson a safe plane for beach operations, because of the small tires and wheels. Peterson had previously testified as a witness for the appellants, so his testimony may be considered as impartial. (Tr. 149-150, 134.) Various witnesses estimated the value of the aircraft in September, 1947, at \$8,500, \$9,500, \$5,500 and \$5,000. (Tr. 40, 47, 74, 82, 108, 138.)

Verdict, Judgment and Appeal.

The jury found that the appellee was entitled to recover the sum of \$7,500.00 from appellants. (Tr. 190.) Judgment was entered accordingly, together with interest at the rate of six percent per annum, on March 26, 1948. (Tr. 21-23.) Appellants filed motions for judgment notwithstanding the verdict, and for a new trial, both of which were denied. (Tr. 20, 25.) Appellants thereupon filed their petition for appeal

on April 26, 1948, together with their assignments of error. (Tr. 26, 28.)

SUMMARY OF ARGUMENT.

A. The complaint states facts sufficient to constitute a cause of action.

1. The complaint states facts sufficient to constitute a cause of action, and the motions and demurrers addressed to it were properly denied and overruled by the trial court, under the rules of procedure in effect at the time of the trial.

2. No demand for the return of the bailed chattel need be alleged where it has been destroyed.

B. The complaint sets forth a plain statement of the claim showing that the plaintiff is entitled to relief under the Federal Rules of Civil Procedure, now in effect in the District Court for the Territory of Alaska.

1. The Court of Appeals, in considering a judgment on appeal, will dispose of the case according to the present law, rather than the law as it existed at the time of the judgment.

C. The instructions, as a whole, fully and fairly presented the issues to the jury.

ARGUMENT.

A. THE COMPLAINT STATES FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

The burden of appellants' brief is that the trial court erred in overruling the general demurrers to the complaint, on the ground that the complaint did not allege facts sufficient to constitute a cause of action. Although numerous errors are assigned, including a blanket allegation that the court erred in failing to give all of the instructions requested by the appellants, the only serious argument is addressed to the demurrers.

1. The complaint states facts sufficient to constitute a cause of action, and the motions and demurrers addressed to it were properly denied and overruled by the trial court, under the rules of procedure in effect at the time of the trial.

Appellants contend that the complaint in the present action is essentially one based on the common law action of trover, and maintain that such a complaint must contain all of the material allegations which were necessary at common law. Among those allegations, appellants insist, was a statement, in so many words, that the pleader was entitled to the immediate possession of the chattel at the time of the conversion.

Alaska, following the example of many of the states, early adopted a Code of Civil Procedure under which "all the forms of pleading heretofore existing in actions at law and suits in equity" were abolished. III A.C.L.A. Ch. 5, Sec. 55-5-1. Under the Code, in effect in Alaska at the time of the trial and judgment in the present case, a complaint is sufficient

which contains "a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition". III A.C.L.A. Ch. 5, Sec. 55-5-32.

The common law action of trover or conversion developed in the seventeenth century as a branch of the action of trespass or case. In its original form the action was based on a series of fictions, the pleader alleging that he had "casually lost" a certain chattel, and that the defendant had "casually found" it and converted it to his own use. In this form the action speedily replaced the earlier action of detinue. See, Plucknett, *A Concise History of the Common Law*, 336; Radin, *Anglo-American Legal History*, 448. Stripped of the fictions, the essential elements of the action are: (1) a description of the property; (2) the plaintiff's right to such property; (3) the wrongful conversion; and (4) the value, or the damages sustained. *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N.W. 214; *Williams v. Gray*, 62 Mont. 1, 203 Pac. 524. As the Colorado court has said,

"The complaint contained a much more detailed statement of the facts than was necessary, but it was good under *Littel v. Brayton Co.*, 70 Colo. 286, 201 Pac. 34. It follows, from the decision in *Baker v. Cordwell*, 6 Colo. 199, that all that is necessary under the Code is to allege that defendant took certain goods of the plaintiff (describing them) and converted them to his own use, which would be equivalent to trespass de bonis at common law, or that he came into possession of certain goods of the plaintiff (describing them) and converted them to his own use, which would be

equivalent to trover at common law with the fictions eliminated. Under the phrase "of the plaintiff", the plaintiff may prove at the trial any kind of general or special property that will support his right of immediate possession of the goods at the time of the conversion, and under a denial that said goods were the goods of the plaintiff the defendant may give any competent evidence tending to controvert the general or special property in plaintiff." *Casco Mercantile & Trust Co. v. Central Savings Bank*, 226 Pac. 868, at 869 (S. Ct. Colo.).

These principles with regard to pleading an action of conversion have been followed by the District Court for the Territory of Alaska, and confirmed by the Circuit Court of Appeals in the case of *Pioneer Mining Co. v. Mitchell*, 190 Fed. 937 (C.C.A. 9th, 1911). In that case the complaint alleged that defendants had entered upon plaintiff's mining claim, extracted gold, and appropriated and converted the same to their own use. This court said, at page 939,

"The strong contention of counsel for plaintiffs in error is that the action is one of trespass *quare clausem fregit*, and, being such, the plaintiff must show actual or constructive possession, without which he cannot recover. If the action be technically such as is suggested, then it may well be conceded that counsel's conclusion should follow. Counsel for defendant in error contends, however, that the action is in the nature of a trespass *de bonis asportatis*, or trover, and is appropriate to recover the royalties that defendants received from the mine.

“Under the Alaska statute, all forms of action are abolished. Section 1, c. 1, tit. 2, Civil Code of Procedure of Alaska, 1 Fed. St. Ann. 55. Under this procedure, it is simply necessary to state the facts out of which the cause of action arises. ‘And when’, says the Supreme Court of Kansas, ‘the plaintiff has stated the facts of his case he will be entitled to recover thereon just what such facts will authorize.’ *McGonigle v. Atchinson*, 33 Kan. 726, 736, 7 Pac. 550, 553. Continuing, the court further says:

‘We now look to the substance of things, and not merely to forms and fictions. If the facts stated by the plaintiff would authorize a recovery under any of the old forms of action, he will still be entitled to recover provided he proves the facts. If the facts stated would authorize one or two or more kinds of relief, he may then elect as to which kind of relief he will obtain; and the prayer of his petition will generally indicate his election.’ * * * So in the present case we think the statement of facts quite sufficient to entitle the plaintiff to recover as for gold taken from the mine of plaintiff and converted to the use of the defendants. The complaint alleges that defendants entered upon the mine and extracted the gold, and appropriated and converted the same to their own use, and prays damages. And why should not the plaintiff be entitled to recover?’”

The decision in the *Pioneer Mining Company* case sets forth no unique or unusual rule of pleading or statutory interpretation; to the same effect are the decisions of the great weight of existing authority. Oregon has identical provisions in its Code of Civil

Procedure (Oregon Code, Sec. 1-704), and that Court has said,

“There is an interesting discussion in the briefs of counsel as to whether this is an action in trover or on trespass. We think the distinction of little consequence, although the complaint lacks many of the elements of an action of trover and none of those which are required in an action of trespass * * * However, the distinctions argued by counsel are not material here, as it was never the intent of our Code to require a pleader to conform his statement of facts to any of the common-law forms of action. If his complaint contains ‘a plain and concise statement of the facts constituting his cause of action,’ it is sufficient, although it may sound partly in trover and partly in trespass. The complaint here is sufficient.” *Lun v. Mahaffey*, 185 Pac. 746 (S. Ct. Ore., 1919) at 748.

And, in interpreting the similar provision of the California law (Cal. Code Civ. Proc., Sec. 426) the California Supreme Court directed the trial court to overrule a demurrer, saying,

“* * * as the demurrer was general, respondent rightly contends that the judgment should be affirmed if, for any other reason, the complaint does not contain a sufficient statement of facts to constitute a cause of action. And it is contended that the averment of conversion is not sufficient. The averment is, after a description of the property, that the defendants’ testator ‘unlawfully converted and disposed of the same to his own use’, and the contention is that there should have been a statement of the particular

facts constituting the conversion; that is, the specific acts and methods by which the conversion was accomplished. This contention is not maintainable. An averment that defendant converted the property to his own use is a sufficient averment of the fact of conversion. It was so expressly held in *Daggett v. Gray*, 110 Col. 162, 42 Pac. 568, where the Court said: 'The allegation that defendants converted and disposed of the property to their own use is the allegation of a fact sufficient, in the absence of a special demurrer to sustain a judgment.'

"A more serious contention is that the complaint fails to sufficiently aver any ownership or right of possession by plaintiff in the property in question at the time of the alleged conversion. It is averred on this subject that on July 22, 1896, plaintiff was the owner of the property, and on that day delivered it to defendant's testator as security for a certain indebtedness owing to him by that plaintiff; that afterwards, on May 10, 1897, the said indebtedness was fully paid and discharged, and that on said last-named day, said property being in the possession of said testator, the latter 'well knowing that said bonds and coupons last aforesaid were the property of the said plaintiff, and should belong and appertain to him,' unlawfully converted the same, etc. This certainly is a crude, roundabout, and indirect averment of the fact that plaintiff was the owner of the property at that time; but, as against the general demurrer, under our liberal system of pleading, it is sufficient. *The intended statement of the fact is not couched in apt language, but there is not an en-*

tire absence of a statement of such fact. The averment could not have been true unless the plaintiff was the owner of the property, or entitled to its possession, at the time of the alleged conversion; and defendant could not have misunderstood the averment, or have been in any way prejudiced, by the form in which it was made." (Emphasis supplied.) *Lowe v. Ozmun*, 137 Cal. 257, 70 Pac. 87, 88.

The closing remarks of the court in the case just cited are particularly pertinent in the present instance. The whole theory of appellants' answers and defense was based on a claim that *they* had the right to the immediate possession of the plane as bailees by reason of a rental or charter contract; there was no dispute as to ownership; appellants clearly understood the averments of the complaint and were not prejudiced in any way by the form in which they were made. In accord with the decisions previously cited in this regard are *Lafara v. Teal*, 61 N.E. 794 (Ind. App. 1901); *Terrien v. Joseph*, 53 Atl. (2d) 923 (S. Ct. R.I., 1947); *Phelan v. Vestner*, 54 S.E. 697 (S. Ct. Ga., 1906); *Rockwell v. Day*, 82 N.Y.S. 993 (App. Div., 1903); *Denver Livestock Commission Co. v. Lee*, 18 F. (2d) 11 (C.C.A. 8th, 1927).

The complaint in the present case not only alleged a general ownership of the aircraft by the appellee during the entire period, and that appellants wrongfully "took possession" of it, but also alleged that the appellants had wrongfully used the plane by flying it to certain points in violation of any limited

use which the appellee had previously authorized. The appellants made this the chief issue in their answers and in the evidence they presented, contending that the agreement gave them the right to use the plane on a rental basis. On this issue, it is fundamental that a bailee who misuses the property bailed by a departure from the terms of the bailment is guilty of conversion. Where there is such a conversion, the bailee will be liable for the full value of the property should it be destroyed, and it is immaterial whether the injury is the proximate result of the conversion, since the act of conversion itself renders the converter liable. 53 *Am. Jur.* "Trovers and Conversion", Sec. 51. Thus, the *Restatement*, "Torts", Sec. 227 states:

"A bailee who is in possession of a chattel under a bailment which does not permit him to make any use of it is liable to the bailor for a conversion if he uses the chattel, unless the circumstances are such as to afford him a privilege to use it irrespective of the bailor's consent."

and, in Sec. 228:

"A bailee who is in possession of a chattel under a bailment for use is liable to his bailor for a conversion if he so uses the chattel as to constitute a material breach of the contract of bailment unless he is otherwise privileged to do so."

So, in the present case, the appellee's complaint alleged and his proof demonstrated, that the only use appellants were to make of the plane was to taxi it down to the hangar for an inspection. Appellants

violated this bailment contract, if such it was, by flying the plane extensively and at a distance in the course of their own business; in the course of this unauthorized use the plane was totally destroyed. Clearly the appellants were guilty of conversion, as alleged in the complaint. Thus, in *Baxter v. Woodward*, 158 N.W. 137 (S. Ct. Mich., 1916) the defendant had driven and wrecked an automobile left with him for storage and sale by the plaintiff. The court said,

“The general rule is that if a bailee, having authority to use a chattel in a particular way, uses it in a different way, or to a greater extent than authorized, such unauthorized use is a conversion of the chattel, for which the bailor may maintain trover for its value. It is a conversion for a bailee for hire, to apply the thing hired to a purpose other than that agreed upon in the contract of hire. This principle has been applied where a horse was killed or injured while being driven or ridden by the hirer to a place not mentioned in the contract of hire.” (Citing many cases.) 158 N.W. 139.

To the same effect is *Vermont Acceptance Corporation v. Wiltshire*, 153 Atl. 199 (S.Ct. Vt., 1931); *Annotation*, 26 L.R.A. 366. With regard to the use or misuse of the bailed property there is no distinction between a horse, an automobile, or an aircraft; the general rules of bailment apply to each with equal effect. *Whitehead v. Johnson*, 268 N.Y.S. 368 (App. Div. 1934); *Ogden v. Transcontinental Airport*, 180 N.E. 737 (Ohio, 1931); and see *United Air Services v. Sampson*, 86 Pac. (2d) 366 (Calif. 1938).

2. No demand for the return of the bailed chattel need be alleged where it has been destroyed.

Appellants contend, in their brief, that the complaint in the present case is further lacking in that it fails to allege a demand for the return of the aircraft. It is perfectly true that the complaint contains no such allegation, nor is such an allegation necessary. A demand is never necessary unless the facts alleged indicate that the defendant was in lawful possession of the property; in the instant case the complaint specifies that the appellants "wrongfully and unlawfully took possession" of the aircraft. A demand must be alleged only where the conversion is based on the refusal to return the property after such a demand; no demand need be stated where the other facts pleaded show the conversion. *Vermont Acceptance Corporation v. Wiltshire*, 153 Atl. 199, 73 A.L.R. 792 (S.Ct. Vt. 1931). In that case, the defendant had purchased an automobile on a conditional sales contract. Thereafter he used it in bootlegging, and it was seized and forfeited to the Government, in violation of the contract which forbade any use of the vehicle in connection with a law violation. The court, after establishing that this use of the automobile constituted a conversion by the bailee, pointed out that no allegation of demand and refusal was necessary "when the conversion is otherwise established as it is here". 75 A.L.R. 799. See also *Baxter v. Woodward*, 158 N.W. 137 (S.Ct. Mich.); *Terrien v. Joseph*, 53 Atl. (2d) 923 (S.Ct. R.I. 1947). Compare *Jeffries v. Pankow*, 229 Pac. 903 (S.Ct. Ore. 1924) where the court said:

“In such case, no cause of action in trover or conversion will lie against him without a demand for the return of the property, *unless it shall further appear that the defendant has put it beyond his power to comply with the demand, so that a demand would be useless.*” (Emphasis supplied.) 229 Pac. 903 at 905.

Obviously, a demand is never necessary, because futile, where the chattel is totally destroyed, as was alleged by plaintiff in his complaint in the present case. *American Surety Co. v. Baker*, 172 F. (2d) 689 (C.C.A. 4th, 1949).

B. THE COMPLAINT SETS FORTH A PLAIN STATEMENT OF THE CLAIM SHOWING THAT THE PLAINTIFF IS ENTITLED TO RELIEF UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, NOW IN EFFECT IN THE DISTRICT COURT FOR THE TERRITORY OF ALASKA.

By Chapter 343, Public Law 175, 81st Congress, the Federal Rules of Civil Procedure were made applicable to the District Court for the Territory of Alaska and to appeals therefrom. The Act was approved July 18, 1949.

Under the Federal Rules of Civil Procedure, now in effect in the Territory, the plaintiff, after alleging jurisdiction and demand for judgment, need only allege that: “On or about September 6, 1947, the defendants converted to their own use one Stinson aircraft, SR-9 Type, Number NC 18411 of the value of \$8,500.00, the property of the plaintiff.” Form 11, “Complaint for Conversion”, Federal Rules of Civil

Procedure, 28 U.S.C.A. foll. Sec. 723c. As Judge Lindley said in passing on a similar complaint, on motion to dismiss :

“The validity of the pleading is to be determined under the Federal Rules of Civil Procedure, 29 U.S.C.A. foll. Sec. 723c. By Rule VIII the term, ‘cause of action’ is abandoned and in its place is substituted ‘claim for relief’. The rule prescribes a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for the relief to which he deems himself entitled.

“Tested by these requirements, I deem the complaint sufficient. It avers that certain oil belonged to and was the property of the plaintiff; that defendants took, converted and disposed of the same to their own use. The prayer is for recovery of damages of \$50,000.00. To my mind, these averments constitute a valid claim for relief for conversion of personal property, alleged to belong to plaintiff.” *Piersol v. Bendum Trees Oil Corp.*, 2 F.R.D. 133, 134; in accord, *U. S. v. Fleming*, 69 F. Supp. 252 at 258.

1. **The Court of Appeals in considering a judgment on appeal will dispose of the case according to the present law rather than the law as it existed at the time of judgment.**

Since the complaint is sufficient under the Federal Rules of Civil Procedure, currently in effect, the judgment of the trial court overruling the demurrers should be affirmed on appeal. Any error which the trial court might have committed in refusing to dismiss the complaint has been corrected by an intervening act of Congress applicable to the trial court’s procedure, and the Court of Appeals should conform its disposition of the case to the procedure now existing in the trial court,

even though such procedural change took effect after the entry of the judgment.

The general rule, supported by the great weight of authority, is that an appellate court, in reviewing a judgment on appeal or error, will dispose of the question according to the law prevailing at the time of such disposition and not according to the law prevailing at the time of the rendition of the judgment. This procedure will be followed even though it may be necessary to reverse a judgment which was correct at the time it was rendered, or to affirm a judgment which was erroneous at the time it was rendered. 111 A.L.R. 1317 at 1318; 2 *Am. Jur.* P. 668, "Appeal and Error", Section 1157.

The basis for this line of decision rests on *United States v. The Peggy*, 1 Cranch (U.S.), 103, 2 L. Ed. 48:

"It is in the general true that the preview of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." (1 Cranch (U.S.) 103 at 110.

Thus, in *Dismore v. Southern Express Company*, 183 U.S. 115, 46 L. Ed. 111 (1901) plaintiffs brought suit to enjoin the express company from using any of its money for the purchase of stamps to be placed upon bills of lading, as required by the War Revenue Act of June 13, 1898. The case was heard in the District Court upon demurrers to the bills, and an

order entered on March 7, 1899, refusing to enjoin the express company from voluntarily paying the tax, but enjoining the State officials from collecting it. Upon appeal, the Circuit Court of Appeals reversed the decree on June 7, 1900, with directions to dismiss the case. After the submission of the case to the Supreme Court on certiorari, the War Revenue Act of 1898 was amended by Congress on March 2, 1901, so as to expressly exempt express companies from the operation of the Act. Under these circumstances, the Supreme Court affirmed the order directing the dismissal of the suit, giving full effect to the 1901 amendment. Although the case had been submitted to the Supreme Court prior to the amendatory act, the court pointed out that the intervening law had positively changed the governing rule and must be obeyed.

Again, in *Missouri, ex rel. Wabash Railway Company v. Public Service Commission*, 273 U.S. 126, 71 L. Ed. 575, a new state statute on the subject of the litigation had interposed between the decision below and the decision of the Supreme Court. Since the effect of the new statute was to give the State Commission certain administrative discretion, the Supreme Court, giving effect to the statute, reversed the judgment below and remanded the cause for further proceedings.

In *Carpenter v. Wabash Railway Company*, 309 U.S. 23, 84 L. Ed. 558, the Bankruptcy Act had been amended to grant certain priorities after the decision in the lower court, and while the case was pending before the Supreme Court upon petition for certiorari. The lower court had correctly denied the priori-

ties under the Bankruptcy Act as it existed at the time of its decision. The Supreme Court assumed without deciding that the determination of the court below was correct upon the record before it and in the light of the law as it then stood, but went on to state, “* * * it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable.” 309 U.S. 27. Accordingly, the judgment below was vacated and the cause remanded with directions to allow the priority.

The same principle will be applied whether the change in the rule of decision be accomplished by statute or treaty, or by a new decision of the controlling court. In *Vandenbark v. Owens-Illinois Glass Company*, 311 U.S. 538, 85 L. Ed. 327, plaintiff brought suit in the U. S. District Court for the Northern District of Ohio (based on diversity of citizenship) alleging that she had contracted various occupational diseases through the negligence of the defendant. The trial court sustained a motion to dismiss on the ground that the petition failed to state a cause of action, which ruling was affirmed by the Circuit Court of Appeals. The basis for these decisions was that under the law of Ohio, no recovery was permitted at the time of the judgment in the trial court for the types of occupational diseases covered by the petition. However, after the action of the trial court in dismissing the petition, the Ohio Supreme Court reversed its former decisions and, in an opinion expressly overruling them, declared such occupational diseases compensable under the Ohio common law. Applying its previous decisions, the Supreme Court

held that the judgment must now be reversed, since "the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the *then* controlling decision of the highest state court." 311 U.S. 543.

C. THE INSTRUCTIONS, AS A WHOLE, FULLY AND FAIRLY PRESENTED THE ISSUES TO THE JURY.

Appellants requested twenty-one specific instructions at the trial, and have generally assigned error on the refusal of the Court to give all of these instructions. (Tr. 6-12.) The brief nowhere specifies the "grounds of the objections urged at the trial" to the refusal to give these instructions, as is required by Rule 20 of the rules of this court.

A general exception to the giving or refusing to give a series of instructions is insufficient, and an exception to the charge in its entirety is not available if any one of the portions of the charge excepted to is given. As the court pointed out in *Harrington v. United States*, 267 Fed. 97 (C.C.A. 8th, 1920):

"When a number of instructions are requested, containing distinct propositions of law, a general assignment of error to the refusal to give them all cannot be sustained, if any one of the instructions is properly refused." 267 Fed. 97, at 104.

In the instant case, the trial court gave a general charge to the jury, which fully covered all of the law involved in the proceedings. Appellants have not attempted to criticize separate passages or portions of

the charge. Considered as a whole, the instructions of the court fairly and substantially presented to the jury the issues to be decided, and the judgment should not be disturbed on appeal. *Goodyear Fabric Corp. v. Hirss*, 169 Fed. (2d) 115 (C.C.A. 1st 1948); *Rowe v. Dixon*, 196 Pac. (2d) 327 (S. Ct. Wash. 1948).

CONCLUSION.

In summarizing, appellee submits:

1. The complaint stated facts sufficient to constitute a cause of action for conversion under the Alaska Code of Civil Procedure, and the trial court was correct in overruling and denying the demurrers and motions addressed to it.

2. The validity of the complaint is now governed by the Federal Rules of Civil Procedure, and the complaint adequately states a claim under those rules.

3. The instructions of the court fairly and substantially presented to the jury the issues of the case within the reasonable discretion of the trial court.

Wherefore, appellee submits that the judgment of the trial court should not be disturbed and that the judgment should be affirmed.

Dated, Anchorage, Alaska,
December 23, 1949.

Respectfully submitted,

W. N. CUDDY,

WENDELL P. KAY,

Attorneys for Appellee.

No. 12231

United States
Court of Appeals
for the Ninth Circuit

ALASKA AIRLINES, an Alaskan
Corporation,

Appellant,

VS.

ARTHUR J. OSZMAN,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska
Third Division

FILED

JUN 9 - 1949

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BUELL A. NESBETT,
Anchorage, Alaska,

S. J. McCUTCHEON,
Anchorage, Alaska,

Attorneys for Arthur J. Oszman, plaintiff
and appellee.

W. N. CUDDY,
Anchorage, Alaska,

WENDELL P. KAY,

Anchorage, Alaska,

Attorneys for Alaska Airlines, an Alaskan
Corporation, defendants and appellants.

In the District Court for the Territory of Alaska,
Third Division

No. A-4586 Civil

ARTHUR J. OSZMAN,

Plaintiff,

vs.

ALASKA AIRLINES, an Alaskan Corporation,
Defendant.

COMPLAINT

The plaintiff complains of defendant, and alleges:

I.

That during all the times herein mentioned the defendant was and now is a domestic corporation, organized and existing under and by virtue of the laws of the Territory of Alaska, with an office for the transaction of business in the City of Anchorage, Third Division, Territory of Alaska.

II.

That between the 1st day of May, 1944, and the 31st day of March, 1947, at the request of the defendant, the plaintiff expended the sum of One Thousand Eight Hundred Forty and 53/100 Dollars (\$1,840.53), while in the performance of his duties as District Traffic Manager for defendant in the City of Juneau, Territory of Alaska, and Seattle, Washington, for the use and benefit of defendant, as more particularly set forth in Exhibit "A," attached hereto and made a part hereof.

III.

That the said monies were expended by plaintiff in the furtherance of defendant's business interests and solely in reliance on defendant's verbal promise to repay plaintiff for said expenditures.

IV.

That plaintiff has repeatedly demanded payment of same from defendant, but defendant has not repaid the same, nor any part thereof. [1*]

Wherefore, plaintiff prays judgment against defendant in the sum of One Thousand Eight Hundred Forty and 53/100 Dollars (\$1,840.53) with interest at the rate of six (6) per cent per annum on each item from the date of the expenditure of the money represented by each item, for costs of suit, a reasonable attorney's fee and for such other and further relief as to the Court may seem proper.

McCUTCHEON & NESBITT,
Attorneys for Plaintiff,

By /s/ BUELL A. NESBETT.

United States of America,
Territory of Alaska—ss.

Arthur J. Oszman, being first duly sworn, on oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing Complaint,

* Page numbering appearing at foot of page of original certified Transcript of Record.

knows the contents thereof, and the same is true as he verily believes.

/s/ ARTHUR J. OSZMAN.

Subscribed and Sworn to before me this 19th day of June, 1947.

(Seal) /s/ S. J. McCUTCHEON,
Notary Public in and for Alaska. My commission
expires 12/29/47. [2]

EXHIBIT "A"

May, 1944 — Transportation from Minneapolis, where plaintiff was employed, to Fairbanks, via Northwest Airlines; advanced by plaintiff on defendant's promise to repay plaintiff after six months employment	\$ 219.30
Miscellaneous expenses incurred while District Traffic Manager in Juneau, May, 1944, to April, 1945 (office expenses, transportation, entertainment, etc.).....	989.63
Gastineau Hotel	181.80
Transportation — Anchorage to Juneau, September, 1946 (Pacific Northern Airlines)	80.50
Shortage in salary check, January 1-15....	159.25
Miscellaneous office expenditures February, 1947, Seattle, Washington	103.17
Miscellaneous office expenditures, March, 1947, Seattle, Washington	106.88
Total	<hr/> \$1,840.53

[Endorsed]: Filed June 21, 1947. [3]

[Title of District Court and Cause.]

DEMURRER

Comes now the above-named defendant, by his attorneys W. N. Cuddy, and E. L. Arnell, and demurs to the plaintiff's complaint in the above-entitled cause upon the ground that; said

(a) said complaint does not state facts sufficient to constitute a cause of action against the defendant, and

(b) that said complaint does not state facts sufficient to constitute a cause of action.

/s/ W. N. CUDDY,

Attorney for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 7, 1947. [4]

M.O. OVERRULING DEMURRER

Now at this time the plaintiff not being present but represented by Buell A. Nesbett of his counsel, the defendant not being present but represented by Edward L. Arnell of its counsel, the following proceedings were had, to-wit:

Argument to the Court was had by Edward L. Arnell, for and in behalf of the defendant.

Whereupon the Court having heard the argument of respective counsel in cause No. A-4586, entitled Arthur J. Oszman, plaintiff, versus Alaska Airlines,

defendant, overruled Demurrer and defendant given until Monday, August 18, 1947, to file Answer.

Entered Court Journal No. G-15, Page No. 38, Aug. 11, 1947. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now, the above-named defendant and for answer to the Plaintiff's complaint admits, denies and alleges as follows:

I.

That the defendant is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and as such a corporation is qualified, according to law, to defend this action, said corporation having paid its license tax for the year 1947, and filed its annual reports last due.

II.

The defendant denies all allegations set forth in paragraphs II, III and IV, of Plaintiff's complaint.

Wherefore, the Defendant, having answered plaintiff's complaint, prays that the same be dismissed and that the defendant be awarded its costs incurred and expended herein including a reasonable attorney's fee to be allowed by the Court.

ALASKA AIRLINES,
An Alaska Corp.,

By /s/ J. E. GRIFF,
Treasurer .

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 18th day of August, 1947, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally came J. E. Griff known to me, and known to be an officer, to-wit, the treasurer of the above-named Corporation, that he is authorized according to law for and on behalf of such Corporation to make this verification, that he has read the foregoing answer to plaintiff's complaint, knows the contents thereof and the same is true as he verily believes.

Witness my hand and Notarial Seal on the day and year last above written.

(Seal) /s/ W. N. CUDDY,
Notary Public in and for Alaska. My commission
expires 8-29-49.

[Endorsed]: Filed Aug. 18, 1947. [6]

TRIAL BY JURY CONTINUED

Now came the Trial Jury who, on being called, each answered to his or her own name came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-4586, entitled Arthur J. Oszman, plaintiff, versus Alaska Airlines, an Alaskan Corporation, defendant, was resumed.

Arthur Oszman, heretofore duly sworn, resumed the witness stand for further testimony for and in his own behalf.

The plaintiff rests.

At this time Wendell P. Kay, for and in behalf of the defendant, moves that the Jury be excused pending argument on points of law.

At this time Wendell P. Kay, for and in behalf of the defendant, moves the Court that cause be dismissed on grounds stated in previous demurrer; motion denied; and further moves that cause be dismissed on grounds that plaintiff has failed to establish a case on the face of the evidence; motion denied and trial Jury recalled.

Joseph E. Griffin, being first duly sworn, testified for and in his own behalf.

At 3:10 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 3:16 o'clock p.m.

Entered Court Journal No. G-16, Page No. 374, May 28, 1948. [7]

In the District Court for the Territory of Alaska,
Third Division

No. A-4586—Civil

ARTHUR J. OSZMAN,

Plaintiff,

vs.

ALASKA AIRLINES, an Alaskan Corporation,
Defendant.

JUDGMENT

The above-entitled action came on regularly for trial commencing on the 27th day of May, 1948, before the above-entitled Court at Anchorage, Alaska,

the plaintiff, Arthur J. Oszman, being present in person and represented by McCutcheon & Nesbett, his attorneys, and the defendant, Alaska Airlines, Inc., being represented by the person of Joseph E. Griffin and represented by Cuddy & Kay, its attorneys. A jury of twelve persons was regularly impanelled and sworn to try the cause and testimony, both oral and documentary, having been introduced and admitted on behalf of the plaintiff and the defendant, whereupon the Court instructed the jury upon the law in the matter and counsel for plaintiff and defendant argued the matter to the jury and the jury retired to consider their verdict. Upon stipulation of counsel for plaintiff and counsel for defendant at the time the jury retired, the jury was directed to bring in a sealed verdict, returnable at 10:00 o'clock a.m. on the 29th day of May, 1948. Thereupon and at 10:00 o'clock a.m. on the 29th day of May, 1948, the jury returned into Court and returned a sealed verdict, which upon being unsealed in open Court and in the presence of the jury, was found to be a verdict in favor of the plaintiff, reading as follows: "We the jury duly selected, impanelled and sworn to try the above-entitled cause, do find for the plaintiff and against the defendant and find that the plaintiff is entitled to recover of and from the defendant the sum of Eighteen Hundred Forty and 53/100 Dollars (\$1840.53), together with interest thereon at the rate of Six per cent (6%) per annum as claimed in the plaintiff's complaint. Dated at Anchorage, Alaska, this 28th day of May, 1948. M. B. Ames, Foreman." [8]

Wherefore by virtue of the law and by reason of the premises aforesaid, It Is Hereby

Ordered, Adjudged and Decreed that judgment be and is hereby given in favor of the plaintiff, Arthur J. Oszman in the sum of Eighteen Hundred Forty and 53/100 Dollars (\$1840.53) together with interest thereon at the rate of Six per cent (6%) per annum, plus plaintiff's costs and disbursements in this action incurred to be taxed by the Clerk of the Court in the manner provided by law in the sum of Thirty Dollars (\$30.00) and an Attorney's fee in the sum of Four Hundred Dollars (\$400.00) to be fixed by the Court, a total of Two Thousand Five Hundred Forty and 82/100 Dollars (\$2,540.82).

Dated at Anchorage, Alaska, this 2nd day of July, 1948.

/s/ ANTHONY J. DIMOND,

Judge of the District Court.

Received Service this 1st day of July, 1948, Wendell P. Kay, Attorney for Defendant.

Entered Court Journal No. G-17, Page No. 57, July 2, 1948.

[Endorsed]: Filed July 1, 1948. [9]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the defendant above named and moves this honorable court for an order setting aside and vacating the verdict and judgment of the jury heretofore rendered and entered in favor of the plaintiff

and against the defendant in the above-entitled action, and feeling aggrieved by such verdict and judgment moves that a new trial of said action be granted to said defendant for the following causes alleged by defendant as materially effecting its substantial rights and the rulings of the court which were prejudicial to its substantial rights, to-wit:

Errors in law occurring at the trial and excepted to by the defendant.

1. The Court erred in overruling the respective demurrers of defendant to the complaint of plaintiff on file herein.

2. The court erred in denying defendant's motion at the close of plaintiff's case to grant a nonsuit on the ground that plaintiff had failed to prove a case as laid in his complaint.

3. The court erred in failing to instruct the jury as requested by the Defendant in Defendant's proposed instructions 2, 3 and 5.

Insufficiency of the evidence to justify the verdict and judgment.

Wherefore, defendant moves said court to grant a new trial in the above-entitled action.

Dated this 1st day of June, 1948.

/s/ WENDELL P. KAY,

Attorneys for Defendant.

Copy Received June 1, 1948. Buell A. Nesbett.

[Endorsed]: Filed June 1, 1948. [10]

HEARING ON MOTION FOR NEW TRIAL

Now at this time hearing on motion for new trial in cause No. A-4586, entitled Arthur J. Oszman, plaintiff, versus Alaska Airlines, an Alaskan Corporation, defendant, came on regularly before the Court, the plaintiff not being present but represented by Buell A. Nesbett, of his counsel, the defendant not being present but represented by Wendell P. Kay, of its counsel. The following proceedings were had, to-wit:

Argument to the Court was had by Wendell P. Kay, for and in behalf of the defendant.

Whereupon the Court having heard the argument of counsel and being fully and duly advised in the premises, denied motion for new trial.

Entered Court Journal No. G-16, Page No. 388, June 4, 1948. [11]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FOR
SUPERSEDEAS

The petition of Alaska Airlines, an Alaskan Corporation Defendants, in the above-entitled action, for an appeal from the final judgment rendered therein, is hereby granted and the appeal is allowed, and upon petitioners filing a bond in the sum of three thousand dollars with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and en-

tered in the above cause and shall suspend and stay all further proceeding in this court until the termination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ ANTHONY J. DIMOND,
District Judge.

Dated at Anchorage, Alaska, this 23rd day of August, 1948.

Entered Court Journal No. G-17, Page No. 151, Aug. 23, 1948.

[Endorsed]: Filed Aug. 23, 1948. [12]

[Title of District Court and Cause.]

PETITION FOR APPEAL

The above-named defendants, conceiving themselves aggrieved by the judgment made and entered on the 2nd day of July, 1948, in the above-entitled cause, do hereby appeal from the said judgment to the United States Circuit Court of appeals for the Ninth Circuit, for the reasons specified in the assignments of error, which is filed herewith, and said defendants pray that this appeal may be allowed, that a citation may issue according to law, and that a transcript of the record, proceedings and documents upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioners further pray that a supersedeas may be granted pending the final disposition of this

cause, and that the amount of surety may be fixed by the order allowing the appeal.

Dated at Anchorage, Alaska, this 17th day of August, 1948.

/s/ WENDELL P. KAY,

Attorney for the Defendants.

[Endorsed]: Filed Aug. 17, 1948. [13]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now comes the defendant and appellant herein and file the following assignment of error upon which they will rely in the prosecution of their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the 2nd day of July, 1948, by the above-entitled court, as follows, to-wit:

I.

That the court erred in overruling the demurer of defendant to the complaint of plaintiff on file herein, to which ruling defendant excepted and the exception was allowed.

II.

That the court erred in denying defendant's motion at the close of plaintiff's case to grant a non-suit on the ground that plaintiff had failed to prove a case as laid in his complaint, to which ruling defendant excepted and the exception was allowed.

III.

That the court erred in again denying defendant's motion for a non-suit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint, to which ruling defendant excepted and the exception was allowed.

IV.

That the court erred in denying defendant's motion for a judgment notwithstanding the verdict on the ground that the plaintiff had failed to prove a case as laid in his complaint, and, further, the plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein, to which ruling defendant excepted and the exception was allowed.

V.

That the court erred in failing to instruct the jury, as requested by the defendant in the defendant's proposed instructions numbered 2, 3, and 5, to which ruling the defendant excepted and the exception was allowed.

Wherefore, defendant and appellant pray that the judgment in the above-entitled cause be reversed and the cause remanded, with instructions to the trial court as to further proceedings therein and for such other than further relief as may be just in the premises.

CUDDY AND KAY,
By WENDELL P. KAY,
Attorneys for Defendant.

CERTIFIED COPY

United States of America,
Third District of Alaska—ss.

I, M. E. S. Brunelle, Clerk of the United States District Court in and for the Third District of Alaska, do hereby certify that the annexed and foregoing is a true and full copy of the original Assignment of Error, in cause No. A-4586, entitled Arthur J. Oszman, plaintiff vs. Alaska Airlines, an Alaskan Corporation, Defendant, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed by name and affixed the seal of the aforesaid Court at Anchorage, Alaska, this 17th day of May, A.D. 1949.

(Seal)

M. E. S. BRUNELLE,
Clerk.

By /s/ KATHRYN HOFF,
Deputy Clerk.

[Endorsed]: Filed Aug. 23, 1948.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division,
Territory of Alaska:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an Appeal taken in the above-entitled cause, and to include in said transcript of record, the following papers of record in said cause, to-wit:

1. Complaint.
2. Demurrer of Defendant.
3. Minute Order Overruling Demurrer of Defendant.
4. Answer of Defendant.
5. Minute Order Denying Motion for dismissal on demurrer and failure to prove prima facie case.
6. Judgment.
7. Motion for New Trial.
8. Minute Order Denying Motion for New Trial.
9. Order Allowing Appeal and Supersedeas.
10. Order Settling Bill of Exceptions.
11. Petition for Appeal.
12. Praecipe for Transcript of Record.
13. Proposed Bill of Exceptions.

14. Citation on Appeal.
15. Bill of Exceptions. [14]
16. Stipulation re Bill of Exceptions.
17. Order Settling Bill of Exceptions.
18. This Praecipe.

Respectfully,

/s/ WENDELL P. KAY,
Attorney for Defendant,
Alaska Airlines.

Service admitted this 16th day of March, 1949.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed March 17, 1949. [15]

In the District Court for the Territory of Alaska,
Third Division, Anchorage, Alaska

No. A-4586

ARTHUR J. OSZMAN,

Plaintiff,

vs.

ALASKA AIRLINES, an Alaskan Corporation,
Defendants.

CITATION ON APPEAL

To the Plaintiff, Arthur J. Oszman, and his Attorneys, Buell Nesbett & Stanley J. McCutcheon:

You and each of you are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San

Francisco, in the State of California, forty (40) days from the date of this citation, pursuant to the order allowing appeal on file in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, in that certain action pending in said District Court, entitled, "Arthur J. Oszman, Plaintiff, vs. Alaska Airlines, an Alaskan Corporation, Defendants," being No. A-4516 in the files of said District Court, and wherein Alaska Airlines, an Alaskan Corporation, are appellants and Arthur J. Oszman is appellee, to show cause, if any there be, why the judgment rendered against Alaska Airlines, an Alaskan Corporation, should not be corrected and why speedy justice should not be done to the parties in the premises and in that behalf.

Witness the Honorable Anthony J. Dimond, District Judge for the Territory of Alaska, Third Division, this 23rd day of August, 1948, and of the independence of the United States the 172nd.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered Court Journal No. G-17, Page No. 152,
Aug. 23, 1948.

[Endorsed]: Filed Aug. 23, 1948. [16]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered:

That this cause came on for trial before the above-entitled Court, sitting at Anchorage, Alaska, on the 27th, 28th and 29th days of May, 1948, the plaintiff appearing in person and by his attorney, Buell A. Nesbett, and the defendant, Alaska Airlines, appearing by its attorney, Wendell P. Kay, and the following proceedings were had. A jury having been impanelled and sworn did at the conclusion of the trial of said action render its verdict for the plaintiff and against the defendant and found that the plaintiff was entitled to recover of and from the defendant the sum of \$1,840.53.

The complaint in the above-entitled action, which the verdict of the jury was rendered on, reads as follows:

“COMPLAINT

The plaintiff complains of defendant, and alleges:

I.

That during all the times herein mentioned the defendant was and now is a domestic corporation, organized and existing under and by virtue of the laws of the Territory of Alaska, with an office for the transaction of business in the City of Anchorage, Third Division, Territory of Alaska.

II.

That between the 1st day of May, 1944, and the 31st day of March, 1947, at the request of the de-

defendant, the plaintiff expended the sum of One Thousand Eight Hundred Forty and 53/100 Dollars (\$1,840.53), while in the performance of his duties as District Traffic Manager for defendant in the City of Juneau, Territory of Alaska, and Seattle, Washington, for the use and benefit of defendant, as more particularly set forth in Exhibit "A," attached hereto and made a part hereof. [17]

III.

That the said monies were expended by plaintiff in the furtherance of defendant's business interest and solely in reliance on defendant's verbal promise to repay plaintiff for said expenditures.

IV.

That plaintiff has repeatedly demanded payment of same from defendant, but defendant has not repaid the same, nor any part thereof.

Wherefore, plaintiff prays judgment against defendant in the sum of One Thousand Eight Hundred Forty and 53/100 (\$1,840.53) Dollars, with interest at the rate of six (6) per cent per annum on each item from the date of the expenditure of the money represented by each item, for costs of suit, a reasonable attorney's fees and for such other and further relief as to the Court may seem proper.

McCUTCHEON & NESBETT,
Attorneys for Plaintiff.

By /s/ BUELL A. NESBETT.

United States of America,
Territory of Alaska—ss.

Arthur J. Oszman, being first duly sworn, on oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing Complaint, knows the contents thereof, and the same is true as he verily believes.

/s/ ARTHUR J. OSZMAN.

Subscribed and Sworn to before me this 19th day of June, 1947.

[Seal] /s/ S. J. McCUTCHEON,
Notary Public in and for
Alaska.

My commission expires: 12/28/47.”

To the foregoing Complaint, a Demurrer was filed by the defendant, Alaska Airlines, reading as follows:

“DEMURRER

Comes now the above-named defendant, by his attorneys W. N. Cuddy, and E. L. Arnell, and demurs to the plaintiff’s complaint in the above-entitled cause upon the ground that; said

(a) said complaint does not state facts sufficient to constitute a cause of action against the defendant, and

(b) That said complaint does not state facts sufficient to constitute a cause of action.

/s/ W. N. CUDDY,
Attorney for Defendant.”

Thereafter, the following proceedings were had before the Court on the argument and ruling in regard to said Demurrer: [18]

M. O. OVERRULING DEMURRER

Now at this time the plaintiff not being present but represented by Buell A. Nesbett of his counsel, the defendant not being present but represented by Edward L. Arnell of its counsel, the following proceedings were had, to-wit:

Argument to the Court was had by Edward L. Arnell, for and in behalf of the defendant.

Whereupon the Court having heard the argument of respective counsel in cause No. A-4586, entitled Arthur J. Oszman, plaintiff, versus Alaska Airlines, defendant, overruled Demurrer and defendant given until Monday, August 18, 1947, to file Answer."

Thereupon, an Answer was filed by the defendant to the Complaint of the plaintiff, the Answer reading as follows:

"ANSWER

No. A-4586

Comes Now, the above-named defendant and for answer to the Plaintiff's complaint admits, denies and alleges as follows:

I.

That the defendant is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and as such a corporation is qualified, according to law, to defend this

action, said corporation having paid its license tax for the year 1947, and filed its annual reports last due.

II.

The defendant denies all allegations set forth in paragraphs II, III and IV, of Plaintiff's complaint.

Wherefore, the Defendant, having answered plaintiff's complaint, prays that the same be dismissed and that the defendant be awarded its costs incurred and expended herein including a reasonable attorney's fee to be allowed by the Court.

ALASKA AIRLINES,
An Alaska Corp.,

By /s/ J. E. GRIFF,
Treasurer.

United States of America,
Territory of Alaska—ss.

This Is to Certify that on this 18th day of August, 1947, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn as such, personally came J. E. Griff, known to me and known to be the officer, to-wit: the treasurer of the above-named Corporation, that he is authorized according to law for and on behalf of such Corporation to make this verification, that he has read the foregoing answer to plaintiff's complaint, knows the contents thereof and the same is true as he verily believes.

Witness my Hand and Notarial Seal the day and year last above written.

[Seal] /s/ W. N. CUDDY,
Notary Public in and for
Alaska.

My commission expires: 8/29/49." [19]

Thereafter, the cause came on for trial before this Court, at ten o'clock a.m. on Thursday, May 27, 1948, and the following proceedings were had: [20]

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on regularly for hearing in open court at Anchorage, Alaska, at 10:00 o'clock a.m. of Thursday, May 27, 1948, before the Honorable Anthony J. Dimond, United States District Judge.

The plaintiff was present in person with his counsel, Mr. Buell A. Nesbett of McCutcheon and Nesbett of Anchorage.

The defendant company was represented by Mr. Wendell P. Kay, its counsel, of Cuddy and Kay of Anchorage.

A Jury was duly selected, impaneled and sworn.

Opening statement to the jury was had by Mr. Nesbett for and in behalf of the plaintiff.

Opening statement to the jury was had by Mr. Kay for and in behalf of the plaintiff.

The Court: Counsel for plaintiff may call a witness.

Mr. Nesbett: Mr. Oszman.

The Court: Mr. Oszman may be sworn.

ARTHUR OSZMAN,

being first duly sworn, testified in his own behalf as follows:

Direct Examination

By Mr. Nesbett:

Q. Mr. Oszman, state your full name to the Court, please, and spell your last name.

A. Arthur Oszman, O-s-z-m-a-n. [21]

Q. And what is your business profession, Mr. Oszman?

A. Salesman.

Q. And how long have you lived in Alaska?

A. Five years.

Q. How long have you lived in Anchorage?

A. 13 months.

Q. Are you married?

A. Yes.

Q. Do you have children?

A. Three.

Q. Mr. Oszman, were you employed by Alaska Airlines at any time during the year 1944?

A. Starting in May—on the fourth or fifth day of May.

Q. Who employed you, Mr. Oszman?

A. Mr. Pollock, who was then operations manager of the company.

Q. Where were you employed?

A. To be based at Juneau, Alaska.

Q. Where were you employed? Where did Mr. Pollock employ you?

A. At the time I was in Fairbanks at the Air

(Testimony of Arthur Oszman.)

Transport Command leased out by Northwest as a civilian technician.

Q. Where was your home at that time?

A. Minneapolis.

Q. I will ask you whether or not Mr. Pollock offered to pay your air transportation to Alaska as a part of the employment contract?

Mr. Kay: Your Honor, I must object to the form of these questions. There is no necessity for leading this witness, who appears to be an intelligent person.

The Court: Objection is sustained.

Mr. Nesbett: Mr. Oszman, will you state the details of this employment contract with Mr. Pollock?

Mr. Kay: I object to that as calling for a conclusion. [22]

The Court: You can state what was said between you; overruled.

Mr. Nesbett: You may answer.

A. Mr. Pollack merely said that at the end of six months my fare would be reimbursed, which is and has been a policy of the air industry after—generally after 12 months employment.

Mr. Kay: Your Honor, I object to the last part of that answer and move it be stricken.

The Court: It may be stricken. It is not responsive.

Mr. Nesbett: Mr. Oszman, do you know that that was the policy of Alaska Airlines at that time?

A. Yes.

(Testimony of Arthur Oszman.)

Mr. Kay: Now, your Honor——

Mr. Nesbett: If your Honor please, these repeated objections can be made, but I think Mr. Oszman had a perfect right to state what he understood to be a fact of his employment by Alaska Airlines.

Mr. Kay: Counsel is familiar, I believe, with the proper method of examining a witness on direct examination.

The Court: Not his own conclusion.

Mr. Nesbett: Mr. Oszman, did you have to pay your own transportation to Alaska?

A. Yes, it was purchased in St. Paul via Northwest to Winnipeg and Canadian Pacific from Edmonton to Fairbanks, and I was hauled from Fairbanks back into Juneau on a company aircraft.

Q. And what did that transportation cost you to Fairbanks? A. \$219.30, as I recall.

Q. And, Mr. Oszman, did you remain continuously in the employ of the company for a period of six months subsequent to May 5, 1944?

A. It was in excess of 13 months.

Q. Mr. Oszman, did you demand reimbursement from the company for the cost of your air transportation to Fairbanks?

A. There were frequent changes in the executive personnel of the company— [23] six during that period of time—and it was difficult to have any of them, it seemed, get a clear picture of it, although none of the six ever denied it and I have

(Testimony of Arthur Oszman.)

correspondence where they merely wanted ample time to go into it in detail.

Q. Did you demand reimbursement of that amount of the company?

A. Yes, frequently.

Q. Have you ever been paid that amount?

A. No.

Q. Mr. Oszman, I show you this paper and ask if you can identify it.

A. This is a copy of the air transportation receipt which was forwarded to the Treasury Department in Anchorage.

Q. Treasury Department of——?

A. Alaska Airlines, in Anchorage.

Q. And who forwarded it?

A. One of the girls in the office—the Juneau office.

Q. And what does that document purport to relate to?

A. That is the amount I paid out for air fare between St. Paul and Fairbanks, Alaska, in May of '44.

Q. Was the original of that document sent to Alaska Airlines?

A. On one occasion the passenger's receipt was attached to one of the copies, I am quite certain——

Mr. Nesbett: Your Honor, we would like to offer

(Testimony of Arthur Oszman.)

this in evidence (handing document to Mr. Kay).

Mr. Kay: May I ask a few questions with regard to this?

The Court: Yes.

Mr. Kay: Who prepared this?

The Witness: A girl in the Juneau office and one in the Seattle office. There were merely copies of it and additions to it as the fund increased.

Mr. Kay: Did you see them prepared?

The Witness: Yes, I did.

Mr. Kay: You observed them typing it? [24]

The Witness: That is right.

Mr. Kay: Who were the girls?

The Witness: The girl in Juneau's name was May Nelson.

Mr. Kay: They were employees of the Alaska Airlines at that time?

The Witness: They were passenger agents and also office secretaries.

Mr. Kay: Who mailed this? Was it ever mailed?

The Witness: They were put aboard or—or put in the company mail, which was the usual procedure and I believe still is on company material.

Mr. Kay: Who put it in the company mail?

The Witness: I am not certain of that. It's merely left in the office basket—in the outgoing basket.

Mr. Kay: Did you personally place it in the company mail?

The Witness: No, I didn't. I merely let the girl complete it and put it in an envelope.

(Testimony of Arthur Oszman.)

Mr. Kay: Do you know of your own knowledge whether or not it was placed in the company mails?

The Witness: I am certain that it was put in the outgoing basket with other correspondence that arrived in Anchorage.

Mr. Kay: Do you know, of your own personal knowledge, whether or not this thing was placed in the company mail?

The Witness: It was in the outgoing mail basket.

Mr. Kay: That only requires a yes or no answer, Mr. Oszman. Do you know of your own knowledge whether or not this document was placed in the company mail--in the outgoing mail?

The Witness: In the outgoing mail basket, yes; that's as far as I could follow it.

Mr. Kay: You don't know of your own knowledge whether it actually was placed aboard, or placed in the course of mail delivery?

The Witness: That I couldn't be certain of.

Mr. Kay: Well, I object to the introduction of it. [25]

The Court: You may bring it up.

Mr. Nesbett: May I ask one question, your Honor?

The Court: Surely.

Mr. Nesbett: In the ordinary course of Alaska Airlines business the original of that statement would have reached the company officials, would it not, if placed in the outgoing basket?

A. Yes; even payroll checks, incoming or out-bound from the office, were handled in that man-

(Testimony of Arthur Oszman.)

ner. Regardless of importance or lack of importance of correspondence it was handled in the same manner.

The Court: Objection is overruled. It may be admitted and marked Plaintiff's Exhibit No. 1. It may be read to the jury.

(Plaintiff's Exhibit No. 1 admitted in evidence.)

The Court: In this case as in every case exception is noted as of course to all adverse ruling of the Court.

Mr. Kay: Thank you, your Honor.

Mr. Nesbett: Mr. Oszman, do you know of your own knowledge that any other employee of Alaska Airlines has been reimbursed for transportation to Alaska? A. Yes.

Mr. Kay: I object, your Honor, as immaterial.

The Court: Overruled.

The Witness: Yes, Mr. Krug, who is at the present time with Northern Airlines, had his fare reimbursed from Milwaukee, Wisconsin, to Anchorage, Alaska.

The Court: When was that?

The Witness: Within the last six months.

The Court: Well, I think that is too remote. If counsel is seeking to establish a custom, it must be a custom that existed at the time and not some years later. The objection will be sustained and the jury instructed to disregard the answer as to what happened six months ago.

Mr. Nesbett: Do you know of any other prior

(Testimony of Arthur Oszman.)

instances, specifically— [26] if you cannot state the name of the employee do not attempt to.

A. Offhand, no. That is the only specific instance.

Q. Mr. Oszman, can you identify this paper (handed paper to the witness)?

A. This is a letter I forwarded to the Treasurer—present Treasurer, Joe Griffin, and——

Q. Is that Mr. Griffin sitting at the desk with Mr. Kay? A. Yes.

Q. What is the date on that letter?

A. March 13.

Q. Did you sign the original?

A. Yes, I did.

Mr. Kay: What year?

The Witness: Of '47.

Mr. Nesbett: And how was the original handled in the office routine?

A. In the same manner in which the first had been handled: Set in the outgoing mail basket with all company and all other mail—outgoing mail.

Mr. Nesbett: We offer this in evidence, your Honor (handed document to Mr. Kay).

The Court: It may be shown to counsel for the defendant.

Mr. Kay: Who prepared this document, Mr. Oszman?

The Witness: That was prepared by the girl in the Seattle office, who is passenger agent as well as personal secretary.

Mr. Kay: Did you dictate this to her?

(Testimony of Arthur Oszman.)

The Witness: I did.

Mr. Kay: Did you observe her in the process of typing?

The Witness: I did.

Mr. Kay: And did you observe it in the process of being mailed?

The Witness: Yes, in the same manner.

Mr. Kay: Do you personally know it has been mailed?

The Witness: In the same manner as the other was handled, which was company procedure. [27]

Mr. Kay: This was in March, 1947?

The Witness: That is right.

Mr. Kay: When did you receive your notice you have been terminated with Alaska Airlines?

The Witness: About the 14th or 15th.

Mr. Kay: 14th or 15th of what month?

The Witness: Of that same month.

Mr. Kay: Of March?

The Witness: Of March, yes.

Mr. Kay: 1947?

The Witness: That is right.

Mr. Kay: In other words, this was prepared two days before you received your notice of termination?

The Witness: It had been set up, yes.

Mr. Kay: Two days before?

The Witness: Yes.

Mr. Kay: Your Honor, I object to the introduction of this document as a self-serving document, as being prepared for this hearing or a

(Testimony of Arthur Oszman.)

hearing on behalf of the defendant, containing merely an unconnected statement of views of his concerning company liability.

(Document was handed to the Court.)

Mr. Nesbett: If your Honor please, it was prepared before any action was commenced of this nature and while he was still in the employ of the company and as correspondence from one official of the company to another.

Mr. Kay: Your Honor, the letter contains a great number of self-serving statements—declarations on his part—concerning which he is qualified to testify if he wants to here today. There is no necessity of introducing a self-serving summary of his claim in evidence.

Mr. Nesbett: It shows amongst other things his demand of the company for reimbursement, your Honor, and substantiates his oral testimony.—

Mr. Kay: We can stipulate—— [28]

Mr. Nesbett: Just a moment, Mr. Kay—and shows, amongst other things, the attitude of company officials on the matter.

The Court: I think it is not admissible. Objection is sustained. If counsel desires it may be filed, or it may be marked for identification.

Mr. Nesbett: Identification, then, if your Honor please.

The Court: It may be marked for identification as Plaintiff's Exhibit No. 2, but will not be ad-

(Testimony of Arthur Oszman.)

mitted at this time but may be filed and thus become a part of the record.

(Plaintiff's Exhibit No. 2 marked for identification.)

Mr. Nesbett: Mr. Oszman——

The Court: Pardon me, I would like to have the date.

The Clerk: March 13, 1947.

The Court: All right, Mr. Nesbett.

Mr. Nesbett: Can you identify this document, Mr. Oszman? (Handed another document to witness.)

A. This is a recap of the monthly statements which had been forwarded to the Anchorage Treasury Department on numerous occasions in an attempt to obtain collection of the money spent in the efforts of the company while at Juneau through these dates.

Q. And when was that recap prepared?

A. The latter part of—that's in March of '45.

Q. And to who was the original of that recap sent, Mr. Oszman, if you know?

A. That was sent—then there were two changes in the Treasury Department within three weeks or four weeks—it was either—I had addressed to Odenwalder, but he had been replaced by another Treasurer in the meantime—but it had been addressed to Odenwalder.

Q. And what was his position?

A. He also was—his position was Treasurer of Alaska Airlines.

(Testimony of Arthur Oszman.)

Q. And was the original of that recap forwarded to him by you? [29] A. Yes.

Q. In the Regular office routine or personal——

A. Regular company procedure.

Mr. Nesbett: We offer this in evidence, if your Honor please (handing to Mr. Kay).

The Court: Do you offer it in evidence?

Mr. Nesbett: Yes, your Honor.

The Court: It may be shown to counsel.

Mr. Kay: Who prepared this statement?

The Witness: I prepared that.

Mr. Kay: Personally, on the typewriter?

The Witness: No, dictated it to the girl in the office.

Mr. Kay: Now, what did you use as the basis for preparing this recap, Mr. Oszman?

The Witness: My copies of the monthly statements which had been on numerous occasions forwarded to the Anchorage Treasury Department.

Q. (By Mr. Kay): Where are your copies of the statement at the present time?

The Witness: The last group were in desperation handed personally to, I believe, the fourth Treasurer of the company within a period of five weeks.

Mr. Kay: I object to that portion of your answer as unresponsive.

The Witness: Placed on his desk at Merrill Field in his private office.

Mr. Kay: May the answer of the witness be stricken as unresponsive?

(Testimony of Arthur Oszman.)

The Court: Motion is denied—or does counsel wish to ask any more questions?

Mr. Kay: Then you do not have in your possession at the present time copies——?

The Witness: No, he agreed he would take care of it, but things were in such an unsettled condition he wanted me to allow them a little more time, which I readily agreed to, and he held all my copies and I held only the recap.

Mr. Kay: At what time was that, Mr. Oszman?

The Witness: That was the early part of June in 1945, as I was in Anchorage for probably a six-weeks period, I was transferred up here with the organization [30] and elevated in position to General Traffic Manager.

Mr. Kay: May it please the Court, I object to the admission of the document on the ground it is a self-serving document, hearsay, and it is not the best evidence.

The Court: The objection is overruled and it may be admitted and marked Plaintiff's Exhibit No. 3 and it may be read to the jury.

(Plaintiff's Exhibit No. 3 admitted in evidence.)

The Court: Is there any date on that?

(Paper was handed to the Court by the Clerk.)

The Court: Ladies and gentlemen of the jury, this paper is admitted to illustrate the testimony of the witness as to just what his claim is and

(Testimony of Arthur Oszman.)

upon the point as to whether or not he presented the claim to the company. The fact that certain figures are written in this paper does not mean necessarily that those amounts are due. That depends upon the testimony to be given. But it may be admitted, nevertheless, for the purpose as stated. It may be read to the jury.

(Mr. Nesbett read plaintiff's Exhibit No. 3 to the jury.)

Mr. Nesbett: Mr. Oszman, looking at the entry—what is the first monthly entry on that?

A. May, 1944.

Q. Now, Mr. Oszman, is it your testimony that for the month of May, 1944, you sent to the Alaska Airlines Office a detailed statement of expenses incurred during that month?

A. That is true.

Q. And that detailed statement would show what amount then?

A. Yes, the 7425.

Q. And did you save copies of those detailed statements?

A. I did.

Q. And what became of the copies you saved?

A. In June of 1945 my copies were left with Mr. Hedman who was then the new Treasurer of Alaska Airlines—put on his desk—and he admitted they were long overdue but wanted me to give him more time because he had had so many other problems.

Q. Why did he ask for your copies rather than use the original copies?

(Testimony of Arthur Oszman.)

A. They thought it was easier than to attempt to go through their records, and he had on one occasion but was unable to locate any.

Q. And then, did you for each of the months set out in that recap statement prepared detailed statements and mail them to the Alaska Airlines head office?

A. Yes, as was the company policy.

Q. Now, Mr. Oszman, as District Traffic Manager in Juneau, will you describe to the Court and the jury the means by which these personal expenses were incurred?

A. Well, there were various items and reasons: Often I had wire requests from the general office, or officials of the company to either entertain or to personally attend to an arrival of a passenger or personage that they believed important enough to give special attention. Then there were times that I made purchases for Army personnel at locations along the coast where we had stopped for fuel—we had no company employees and Army personnel would service our equipment and in return for that the company purchased magazines and beer—things of that sort—for the Army personnel, and often was the case there wasn't enough money in the cash drawer and I would advance the cash in order to get it aboard the next departure and hope that the drawer would balance out sufficiently so that I could recover my personal loan or outlay of cash. There were various expenditures. Often they were for rooms for

(Testimony of Arthur Oszman.)

passengers brought in and were misinformed and just ticketed and put into Juneau without confirmed space beyond. Passengers were broke and I paid their hotel bills, or advanced them money for a meal or two until they were able to wire and finance themselves through another source. [32]

Q. Was that a part of your duties?

A. That they requested I do whenever in my opinion I believed the passenger was justified in a complaint of that nature. They were mishandled, and they permitted me to do that because it had been my field of work for eight years prior to that with Northwest Airlines where I represented them on the West Coast as an assistant to the West Coast Sales Manager. It was a common practice.

Q. Mr. Oszman, as District Traffic Manager in Juneau during the period set out in that recap, did you have a fund to operate on?

A. No other than a hundred dollars petty cash to begin with, which was not increased, I don't believe, for eight or nine months following my arrival in Juneau. However, at that time the fare from Juneau to Anchorage was \$102.50. We also had an office in Seattle which ticketed passengers regardless of whether we had aircraft available or able to operate over the Juneau-Anchorage route. These passengers would get into Juneau and demand their money be refunded so they could continue by boat. So naturally, the first refund I would make would overdraw my fund by \$2.50; and it

(Testimony of Arthur Oszman.)

was often the occasion I would have to withhold my bank deposit because I would have 18 or 20 arrivals to hold to continue by boat because they had no means to continue to Anchorage by our system, therefore, I was authorized to refund their tickets. Then again I often went into my personal funds so that I could refund those tickets.

Q. Then, Mr. Oszman, were you required at the end of every month to account for all moneys expended? A. Yes; which was done.

Q. Was it possible that you could carry over your personal expenses and deduct them from the petty cash fund of the succeeding months?

A. No. Following the first month I was always in arrears—constantly in arrears—because they were never returned, sometimes for three to four months.

Q. What was never returned?

A. The petty cash checks or miscellaneous checks which were requested and supported by the type of form which I had used to submit the expenses of that statement.

Q. Do you know how the mail between Juneau and Anchorage—Alaska Airlines mail—was handled at that time? [33]

A. It was handled in the same manner, via the ship, in the pilot's pouch. All company mail was what they considered "pilot's pouch"—handled in the same manner, just put in an outgoing basket and first departure would have that put

(Testimony of Arthur Oszman.)

aboard the first available aircraft to the Anchorage area.

Q. Mr. Oszman, did you ever at any time receive any of the amounts set out opposite the months stated in that recap? From Alaska Airlines? A. No.

Q. Have you demanded payment of the total amount due you set out there on the recap?

A. Frequently.

Q. Were you promised by any of the company officials that you would be reimbursed for those expenses?

Mr. Kay: I object, your Honor,—

Witness: Yes, on each occasion.

Mr. Kay: —continual leading of the witness.

The Court: Objection is sustained.

Mr. Nesbett: Mr. Oszman, can you identify this paper (handing paper to the witness)?

A. This is a company form, an "avoid oral instructions" form, used by the company in interdivision correspondence.

Q. What is it?

A. It is from Harold Nordman of the Treasury Department in Anchorage and it is addressed to me in Juneau.

Q. Does it have a date?

A. November 16, 1944.

Q. Do you recognize Mr. Nordman's signature?

A. I do.

Q. And his handwriting? A. I do.

Q. Is that his handwriting?

(Testimony of Arthur Oszman.)

A. That is his handwriting. Did you want me to read it? [34]

(Mr. Nesbett took paper and handed to Mr. Kay.)

Mr. Kay: Who did you say Harold was?

The Witness: He was acting Treasurer at the time of that writing. As I said, they frequently changed. They had about six treasurers within——

Mr. Kay: What was Harold's last name?

The Witness: Nordman.

Mr. Kay: You received other written instruments from Harold?

The Witness: Yes, I did.

Mr. Kay: And know that this is in Harold's handwriting?

The Witness: Yes, it is.

Mr. Kay: It is not written by you?

The Witness: No; that isn't close to my handwriting.

Mr. Kay: I object to the admission of the document on the grounds that it is hearsay.

The Court: Objection is overruled. It may be admitted and marked Plaintiff's Exhibit No. 4 and may be read to the jury.

(Plaintiff's Exhibit No. 4 admitted in evidence.)

The Court: May I see it?

(Clerk handed exhibit to Court.)

Mr. Kay: I would like that last objection to

(Testimony of Arthur Oszman.)

show I also object to it on the ground it lacks a proper foundation.

The Court: Objection will be overruled. These figures are not any too clear to me. It looks like "11/16/44"—is that your reading of it?

The Witness: That's right.

The Court: Very well.

(Mr. Nesbett then read Plaintiff's Exhibit No. 4 to the jury; then handed back to the witness.)

Mr. Nesbett: Now, Mr. Oszman, what checks does Mr. Harold Nordman refer to in the first paragraph of that memo?

Mr. Kay: I object to that question, your Honor, as not only leading but calling for a conclusion this witness cannot possibly know. He calls for a [35] conclusion from this witness as to what somebody else thought.

The Court: Overruled.

Mr. Nesbett: You may answer.

A. I naturally assumed they were to acknowledge my numerous requests for the expenses which were submitted month by month.

Q. Had you corresponded with Mr. Nordman on that subject?

A. Yes; and I had seen him in Juneau on one trip, and as all of us were very busy I naturally didn't press him and merely waited until he had sufficient time to go over the entire list.

Q. Entire list of what?

(Testimony of Arthur Oszman.)

A. Of the expense accounts which were submitted to him.

Q. And what is the date again on that?

A. November 16, 1944.

Q. Mr. Oszman, I show you this paper and ask you if it refreshes your memory as to other expenditures—other reasons why expenditures were made by you as District Traffic Manager and included in part on the recap sheets?

Mr. Kay: Could we know what the witness is referring—

The Court: Pardon me, I didn't understand you, Mr. Kay?

Mr. Kay: I just asked if we could know to what the witness is referring.

The Court: You may see the paper if you desire it. Let Mr. Kay look at the paper.

(Mr. Kay approached witness stand.)

Mr. Nesbett: Does that writing refresh your memory, Mr. Oszman, to the extent you can answer my questions?

A. Yes, it does. When I first came into Juneau and for months thereafter we had no company employees or facilities for handling the turn-around of our equipment. PanAm operated into Juneau and had a full staff of ground personnel which I used with the authority of our main office in Anchorage, and they permitted me to use my own judgment as to what I should pay them based on the frequency of our service in and out of that point. And often—we were never a scheduled car-

(Testimony of Arthur Oszman.)

ried, and often our ships were in while the Pan American employees [36] were off duty there while it was necessary for me to jump in a cab and take them out to the airport. If our ship required any maintenance, why, I paid them for that as well.

Q. How did you pay them?

A. Out of money out of my pocket—personal funds.

Q. Did you have the power to write checks on the company? A. Never.

Q. How long did that practice exist, Mr. Oszman?

A. During the entire time of my stay in Juneau.

Mr. Nesbett: This is a telegram, Mr. Kay. I want to show it to him to refresh his memory as to items of expenditure (handing paper to Mr. Kay).

Q. (Handing paper to Witness): Does that paper refresh your memory as to other expenditures made by you as District Traffic Manager?

A. Yes. This was signed by Mr. Duncan, who was then General Manager for Alaska Airlines, in August of 1944.

Q. Can you state what the nature of those expenditures were?

A. Authorizing me to purchase 50 gasoline drums at \$2.50 each and arrange with Standard Oil to fill with 91-Octane gasoline and ship to Gustavus on the Morrison-Knudsen barge, advise the date the gasoline would be unloaded at Gustavus and defer purchase of shacks temporarily, and defer to ob-

(Testimony of Arthur Oszman.)

tain house from one of the parties that got them.

Q. Mr. Oszman, what funds would you use to accomplish the ends requested?

A. The hundred dollar petty cash fund which they had for me to operate there in Juneau.

Mr. Nesbett: May we have five minutes, your Honor?

The Court: Court will stand in recess until two minutes past three.

(Whereupon recess was had at 2:53 o'clock p.m.)

After Recess

The Court: Without objection the record will show all members of the jury present. Counsel may proceed with examination of the witness. [37]

Mr. Nesbett: Mr. Oszman, can you identify this paper?

A. Yes, this is an office memo sent by Alaska Star Airlines, Anchorage office, with the signature by C. W. McMonagle, who was then treasurer—that's October 3, 1944.

Q. To whom is it addressed?

A. It is addressed to me in Juneau, Alaska.

Q. Is that the original of the memorandum?

A. That is the original outlining a method of—

Mr. Nesbett: That is all. (Took paper and handed to Mr. Kay.) We offer this in evidence, your Honor.

The Court: It may be shown to counsel for the defendant.

Mr. Kay: When did you receive this, Mr.—?

(Testimony of Arthur Oszman.)

The Witness: Within four or five days of the date that is identified there in the right hand corner.

Mr. Kay: Have you seen other instruments initialed by Mr. McMonagle?

The Witness: Yes, I had, frequently, during that period.

Mr. Kay: And are these Mr. McMonagle's initials on this?

The Witness: They are.

Mr. Kay: We have no objection to it.

The Court: It may be admitted and marked Plaintiff's Exhibit No. 5 and may be read to the jury.

(Plaintiff's Exhibit No. 5 admitted in evidence.)

The Court: What is the date of that?

The Clerk: October 3, 1944.

The Court: Counsel may proceed.

(Mr. Nesbett: Read Plaintiff's Exhibit No. 5 to the jury.)

Mr. Nesbett: Mr. Oszman, I will ask you whether or not you carried out the instructions contained in that letter? A. Yes, I did.

Q. I will ask you whether you were able to disburse the funds necessary to [38] carry out those instructions entirely from your petty cash fund?

A. Only at times.

Mr. Kay: Your Honor, I object again to the leading questions being continually asked by the counsel for the plaintiff.

The Court: Overruled as to this question.

The Witness: Only at times was it possible. As I said before, I was constantly in arrears due to this

(Testimony of Arthur Oszman.)

and various other requests from division points of authorized officials of the company for purchases of this nature and other nature. It was never possible to balance out and, therefore, necessary for me to take it out of personal funds.

Mr. Nesbett: I hand you Exhibit No. 3, the recap sheet, Mr. Oszman, and ask you whether or not any of the statements—monthly statements—set out in that recap, were ever objected to by Alaska Airlines officials?

A. They never were objected to. It was just that situation after situation arose. Sometimes it was financial, and naturally I was patient, and with numerous—or many promises, and I realized that they had problems as well as I in Juneau and didn't believe I was alone in them—I permitted this sort of thing to go on because I had the promises of each new official that it would be immediately taken care of.

Q. Did any official of the company even question any of those monthly statements after they were sent in as being incorrect? A. No.

Q. Can you identify this document, Mr. Oszman? (Handed document to the witness.)

A. This is a letter which I had made up while in Seattle during my period of employment with Alaska Airlines, again requesting the payments which were months and years in arrears, and this was addressed to the current Treasurer, J. E. Griffin.

Q. And who wrote the letter?

A. I wrote the letter.

Q. Is that a copy? [39]

A. Or rather, I dictated the letter.

Q. Is that a copy or the original? -

(Testimony of Arthur Oszman.)

A. This is merely a copy.

Q. To whom was the letter addressed?

A. To J. E. Griffin, the Treasurer of Alaska Airlines.

Q. And the date? A. March 13, 1947.

Q. Did you sign the original of that letter?

A. I signed the original.

Q. Was it prepared under your supervision?

A. Yes.

Q. Can you state whether or not the letter was handled in the regular office routine in respect of mailing?

A. Yes, with the procedure that was requested by the company in handling all mail.

Mr. Nesbett: We offer this copy of an original letter in evidence, your Honor. (Handed document to Mr. Kay.)

Mr. Kay: About when did you dictate this letter, Mr. Oszman?

The Witness: In the Seattle office of Alaska Airlines.

Mr. Kay: About when?

The Witness: About the ninth or tenth of March—it may have been—could have varied two or three days—it was in the notebook of the secretary for two or three days that I know of, because Mr. Hoppin, the president, was then in town and had urgent correspondence which was given priority over anything that the regional manager had.

Mr. Kay: Dated March 13: Is that the date on which it was dictated?

(Testimony of Arthur Oszman.)

The Witness: That was the date on which she had set it up in the typewriter.

Mr. Kay: But I say, you had dictated?

The Witness: I dictated it prior to that time.

Mr. Kay: And when did you receive your notice of termination with Alaska Airlines? [40]

The Witness: It was around the 15th of—it was between the 11th and the 15th of March.

Mr. Kay: As a matter of fact, wasn't it about the first of March or the end of February?

The Witness: No. I have a letter which was written to that effect, giving the termination date as the 24th of March.

Mr. Kay: When was that letter dated, do you know?

The Witness: It was dated in Anchorage on the eighth, but it was carried in the pocket of a company employee for a week or better, as he told me. He didn't know the contents of it and it was given to another employee at the Seattle field and eventually wound up in the Seattle office. That was as I recall it.

Mr. Kay: Your Honor, I object to the admission of this document on the grounds it is a self-serving instrument containing a great many hearsay and self-serving statements.

(Document was handed to the Court.)

The Court: Do you care to be heard on it? Objection will be sustained and the letter may be marked for identification as Plaintiff's Exhibit No. 6 and may be filed so as to become a part of the record.

(Testimony of Arthur Oszman.)

(Plaintiff's Exhibit No. 7 marked for identification.)

Mr. Nesbett: Mr. Oszman, when did you leave Alaska Airlines, while you were stationed in Juneau?

A. No, I was temporarily given a promotion in the Anchorage area as general traffic manager and spent probably six or seven weeks in Anchorage prior to going to Kodiak, but I was employed by Alaska Airlines until June 30, 1945.

Q. What was the date of your leaving your duties in Juneau, do you recall?

A. In May—about mid-May.

Q. And did you leave the employ of the company at that time?

A. No, it was merely a transfer to the Anchorage area.

Q. How long did you remain in the Anchorage area? [41]

A. About seven weeks, I believe.

Q. Were you in the employment of Alaska Airlines during that period?

A. That's right.

Q. And where did you then go, Mr. Oszman?

A. Went to Kodiak Island where I had gone into another field. However, the owner of the business which I had taken, managed—taken over as manager—was an agent for Alaska Airlines and I continued in that capacity to represent Alaska Airlines until their certificate expired, which was in August—August 15, 1945.

Q. I will ask you whether or not you returned to

(Testimony of Arthur Oszman.)

the employment of Alaska Airlines subsequent to August of 1945?

A. On about approximately September 14, 1946.

Q. What occurred on that date?

A. I was reemployed by the airline and was to be—well, there was a program outlined and I accepted it. The provision in it was that I spend 30 days in Juneau and then to continue on into the States.

Q. What was a program, now? Explain it to the Court and jury.

A. Oh, they were desirous of operating in through the interior as well as along the coast, and they had wanted me to make surveys in the Midwest and that after these surveys were made that offices would be established and that I would have my choice of either the Minneapolis or the Chicago area. However, the 30 days was spent in Juneau—they were given an extension—the reason for going to Juneau was an extension of their certificate for a 30-day period only, and following that 30-day period I was started on the survey projects which they had previously outlined, and I was wired to continue into Seattle. From Seattle I was sent on into Minneapolis and St. Paul.

Q. How did you reach Juneau from Anchorage, Mr. Oszman?

A. I flew on Alaska Airlines on a proving flight, which has CAA personnel aboard. It is a requirement when a certificate such as that had been extended.

Q. How did your wife reach Juneau?

A. On Pacific Northern Airlines.

Q. Did she pay her fare—or do you know? [42]

A. I paid her fare. It was impossible to carry

(Testimony of Arthur Oszman.)

company employees and an officer of the company advised me to send her down on a carrier and I was—

Q. Can you identify that document? (Handed document to the witness.)

A. Yes, that is a request for reimbursement of the fund in the amount of \$80.50 expended for the wife's transportation from Anchorage to Juneau.

Q. Where was the original of that statement mailed?

A. It was mailed in the—set in the outgoing basket in the Juneau office.

Q. To whom was it sent?

A. To Mr. Griffin in Anchorage.

Q. Was that—the original of that statement signed by you? A. It was.

Q. Prepared under your supervision?

A. Yes.

Q. Can you state whether or not it was handled in the regular office routine with respect to mailing?

A. Yes, it was.

Mr. Nesbett: We offer this copy in evidence, your Honor. (Handed document to Mr. Kay.)

The Court: It may be shown to counsel for the defendant.

Mr. Kay: About when was this prepared, Mr. Oszman?

The Witness: The original was prepared approximately November of '46—the original.

Mr. Kay: About when?

The Witness: In October of '46, I would say—the original.

(Testimony of Arthur Oszman.)

Mr. Kay: The original? You mean—wasn't this copy prepared at the same time?

The Witness: That's merely a copy of—from a recap of expenses over a period of time.

Mr. Kay: That is——

The Witness: Merely a copy taken from a recap.

Mr. Kay: Was the original of this document sent to anyone? Is that a carbon copy?

The Witness: That is a carbon copy, yes.

Mr. Kay: Was the original sent to anyone?

The Witness: Yes, to Mr. Griffin in Anchorage.

Mr. Kay: And when was the original of this document prepared, of which this is a carbon copy?

The Witness: Either after my return to Juneau or after I was assigned to the Seattle office. I am not quite sure, but it was either in the Juneau office or the Seattle office. It was an Alaska Airlines office where we generally made up our expense accounts and took care of our correspondence.

Mr. Kay: Did you personally see this—there is a handwritten word on this: Was a handwritten word on the original which was sent to the Alaska Airlines office? I will show you.

The Witness: That I hadn't seen.

Mr. Kay: Was this handwritten word on there—on the original?

The Witness: I believe Mr. Nesbett wrote that in.

The Court: What was the answer?

The Witness: I believe Mr. Nesbett wrote that word in.

Mr. Kay: Then that word was not on the original instrument that was sent to——

(Testimony of Arthur Oszman.)

The Witness: No. However, expenses were always given in detail and the original was broken down so that it would be very clear to anyone——

Mr. Kay: The original? I don't understand what you mean.

The Witness: Each month we submitted expense accounts.

Mr. Kay: This is separate from an expense account?

The Witness: That was in addition to it, yes.

Mr. Kay: In addition?

The Witness: It was merely a copy—a file copy was all it was—merely a memorandum.

Mr. Kay: Well, I object to the introduction as being a self-serving [44] instrument—hearsay—it lacks a proper foundation.

(Document was handed to the Court.)

The Court: It may be admitted and the jury will disregard the word “wife” written on the body of the paper. What about the words “Harold Nordlund” in handwriting?

Mr. Nesbett: Do you object to those, Mr. Kay?

Mr. Kay: I would like to have the witness explain what they mean.

The Court: What does the name “Harold Nordlund” with a question mark after it written there—what does that mean?

The Witness: I believe that is your writing, isn't it, Buell?

Mr. Nesbett: I don't know. Let's see.

The Witness: It isn't mine. I didn't see any writing on it until it was handed to me.

(Testimony of Arthur Oszman.)

Mr. Nesbett: Well, that isn't my writing, your Honor, I don't know how it got there.

The Court: Well, the words may be stricken and the exhibit may go in otherwise over the objection of defendant as Plaintiff's Exhibit No. 7 to show that demand was made and to illustrate the testimony of the witness.

The Court: What is the amount?

The Clerk: \$80.50.

(Plaintiff's Exhibit No. 7 admitted in evidence.)

The Clerk: Do you wish me to strike out the words?

The Court: Yes, strike out, just with your pen, those two words and they will be disregarded by the jury.

It may be read to the jury.

(Mr. Nesbett read Plaintiff's Exhibit No. 7 to the jury.)

Mr. Nesbett: Did you pay that sum, Mr. Oszman, for the transportation of your wife to Juneau?

A. Yes, I did, as Alaska Airlines was not certified to carry passengers over that route. [45]

Q. I will ask you whether or not you were promised reimbursement by any official of the company for an amount——

A. She was put aboard Pacific Northern, instructed to—I was instructed to do so by the general traffic manager of the company, who was Mr. Edwards at that time.

(Testimony of Arthur Oszman.)

Q. Mr. Ben Edwards, you say?

A. Mr. Ben Edwards.

Q. And have you made other demands of the company for reimbursement of your wife's expenses for transportation to Juneau?

A. That is only one. Many of them I neglected——

Q. Have you ever been reimbursed that amount by the company? A. No.

Q. Can you state where you lived while you were on temporary duty in Juneau?

A. At the Gastineau Hotel.

Q. Can you identify this document? (Handing to witness.)

A. That's the Gastineau Hotel statement which I paid during that period of stay while with Alaska Airlines. I paid that with personal funds.

Q. Is that the original statement?

A. This, I believe, is. I am quite certain of it.

Q. And to whom is the statement made out?

A. To Mr. and Mrs. Art Oszman.

Q. And is the letterhead Gastineau Hotel?

A. Gastineau Hotel.

Mr. Nesbett: We offer this in evidence, your Honor. (Handed document to Mr. Kay.)

The Court: It may be shown to counsel.

Mr. Kay: Mr. Oszman, was Mrs. Oszman employed by the Alaska Airlines at that time?

The Witness: She was not. [46]

Mr. Kay: Who authorized—or did anyone ever authorize you to stay at the Gastineau Hotel—Alaska Airlines?

(Testimony of Arthur Oszman.)

The Witness: They generally wanted us to stay at the Baranof.

Mr. Nesbett: Just a moment, your Honor: This is not cross-examination. I understand Mr. Kay is just questioning the witness as to the validity——

The Court: I think the objection is well taken. There is no statement by the witness, as I recall, which would make the company liable for this expenditure.

Mr. Kay: Therefore, I object.

The Court: The objection is sustained at this time.

Mr. Nesbett: Your Honor, may we have the testimony of Mr. Oszman read back when I asked whether he was authorized and she was placed aboard and he said he was a company executive?

The Court: That is right so far as transportation is concerned, but if there is any testimony that the company agreed to pay their hotel bills in Juneau I have overlooked it. Maybe it is in the testimony but I don't recall. Therefore, I sustained the objection at this time.

Mr. Nesbett: I will ask you, Mr. Oszman, were you promised reimbursement by the company?

A. I was promised by the president of Alaska Airlines and it is accepted policy of all airlines to do that while an employee and his family are away from home base, or give them a minimum of six weeks to find permanent lodging. Covers their expenses while in transit.

Mr. Kay: I object, your Honor, and ask that it be stricken as not responsive.

(Testimony of Arthur Oszman.)

The Court: That part of the answer which refers to some custom of other companies may be stricken. The question was: What was the contract between the plaintiff and defendant in this case. The jury will disregard so much of the answer as has to do with custom. You may proceed, Mr. Nesbett.

Mr. Nesbett: Who was president of Alaska Airlines at that time, Mr. Oszman? [47]

A. Marshall Hoppin.

Q. Is it your testimony that he promised reimbursement for expenses incurred in this trip?

A. He did of that nature, specifically.

Mr. Nesbett: We offer the bill in evidence, your Honor.

The Court: Is there objection?

Mr. Kay: Yes, I object to the admission.

The Court: The objection is overruled. It may be admitted and marked Plaintiff's Exhibit No. 8. It may be read to the jury.

(Plaintiff's Exhibit No. 8 admitted in evidence.)

The Court: Counsel may proceed when he is ready.

(Mr. Nesbett read Plaintiff's Exhibit No. 8 to the jury.)

Mr. Nesbett: Mr. Oszman, did you pay that bill?

A. I paid it week by week—

Mr. Kay: Your Honor, I would like to renew my objection to this statement. It is dated 11/2/1947, which is about six or eight months after this witness

(Testimony of Arthur Oszman.)

has testified he terminated his employment. It covers a period——

Mr. Nesbett: If your Honor please, we have gone over this step by step.

The Court: Wait now—are you through, Mr. Kay?

Mr. Kay: That is all.

The Court: Very well, I will hear from Mr. Nesbett. I thought Mr. Kay was not through.

Mr. Nesbett: Your Honor, we have gone over this step by step and shown by his testimony he was re-employed.

The Court: Well, the motion is denied, if it is a motion, and the objection is overruled, if it is an objection.

Counsel may proceed.

Mr. Nesbett: I am sorry, your Honor, I didn't hear all you said.

The Court: If Mr. Kay made an objection to it, it is overruled, and if he made a motion to strike it is denied, and he will have an exception as of course.

Mr. Nesbett: Mr. Oszman, did you pay the amount set up in that bill yourself?

A. We paid them week by week to that total during my stay in Juneau.

Q. Did you demand reimbursement of that amount from the company? A. Yes, I have.

Q. To whom were these demands addressed?

A. Mr. Griffin, the treasurer.

Q. Can you identify that document? (Handed to witness.)

A. That is the form used to support the hotel

(Testimony of Arthur Oszman.)

bill in hopes of being reimbursed on it, which always had been company policy. It was merely a form we used commonly in submitting our expenses regardless of the nature of them.

Q. Is that a copy?

A. It is merely a copy, yes.

Q. To whom was the original directed?

A. Mr. Griffin.

Q. Who is Mr. Griffin?

A. The treasurer of Alaska Airlines.

Q. Was that bill prepared under your supervision?
A. It was.

Q. Was it handled with the regular office routine with respect to mail, do you know?

A. Using the regular procedure.

Mr. Nesbett: We offer it in evidence, your Honor.

The Court: It may be shown to counsel for the defendant.

(Mr. Nesbett handed document to Mr. Kay.)

Mr. Kay: Did you dictate this yourself, Mr. Oszman?

The Witness: I did.

Mr. Kay: Did you see it after it had been prepared?

The Witness: Yes.

Mr. Kay: And typed?

The Witness: Yes. [49]

Mr. Kay: Do you know of your own knowledge whether or not it was ever mailed?

The Witness: It was set up in the envelope in

(Testimony of Arthur Oszman.)

the regular manner and set in the outgoing mail basket——

Mr. Kay: Pardon me, are you through?

The Witness: Yes.

Mr. Kay: Did your claim for reimbursement for yourself and your wife at the Gastineau Hotel—was that ever made in any other manner than on this statement?

The Witness: I am certain they were.

Mr. Kay: Huh?

The Witness: I am certain they were on a regular form.

Mr. Kay: Isn't this a regular form?

The Witness: No, that is merely the available paper which was in that office as file memos—personal file memos.

Mr. Kay: I object to the introduction of the instrument as being a self-serving instrument prepared as a personal instrument.

The Court: Objection is overruled. It may be admitted and marked Plaintiff's Exhibit 9 and may be read to the jury.

(Plaintiff's Exhibit 9 admitted in evidence.)

The Court: It is admitted as tending to show, if it does, the demand made by the witness for the amount and to illustrate his testimony as to this particular item.

Counsel may proceed. If there is any extraneous writing on the paper it should be removed or stricken out.

Mr. Nesbett: There is none, your Honor.

(Testimony of Arthur Oszman.)

(Mr. Nesbett then read Plaintiff's Exhibit No. 9 to the jury.)

Mr. Nesbett: Can you identify this paper, Mr. Oszman? (Handing paper to the witness.)

A. Yes, this is a wire from the assistant to the general traffic manager [50] in Anchorage.

Q. To whom is it addressed?

A. Addressed to me in Juneau, Alaska—to: "Art Oszman, Alaska Airlines, Juneau, Alaska."

Q. What is the date?

A. October 15, 1945, was the day—the termination date of the certified extension of the certified route to Juneau.

Q. What is the signature?

A. W. R. Lynn, Alaska Airlines.

Q. Is this the original?

A. That is the original.

Mr. Nesbett: We offer it in evidence, your Honor.

The Court: It may be shown to counsel for the defendant.

(Mr. Nesbett handed paper to Mr. Kay.)

Mr. Kay: Mr. Oszman, there seems to be some handwriting on this telegram. Do you know whose that is? (Handed paper back to the witness.)

The Witness: That, I believe, is mine. We used—generally these sat on our desks and we would often take notes across a wire.

Mr. Kay: Do you know when that particular note was made on it?

The Witness: I have no idea of the date.

(Testimony of Arthur Oszman.)

Mr. Kay: But you believe it is your handwriting?

The Witness: I am certain of it.

Mr. Kay: Well, your Honor, I have no objection to the telegram, itself, but I object to the extraneous and self-serving remark which is made in the handwriting on the telegram. (Paper was handed to the Court.)

The Court: It may be admitted and the writing in pen may be covered over by the Clerk so as not to be visible to the jury and will not be read to the jury.

(Plaintiff's Exhibit No. 11 admitted in evidence.)

The Court: Otherwise, the body of the telegram may be read to the jury, and it may be marked Plaintiff's Exhibit No. 11. What is the date of the telegram? [51]

The Clerk: October 24, 1946.

The Court: Thanks. It may be read to the jury.

(Mr. Nesbett read Plaintiff's Exhibit No. 11 to the jury.)

Mr. Nesbett: I will ask you whether or not you went to Seattle in accordance with those instructions, Mr. Oszman?

A. Yes, on the first available southbound aircraft after receiving the wire.

Q. And was that an Alaska Airlines plane?

A. I am quite sure I was able to catch one of their freighters on that date.

Q. I will ask you whether or not you met Mr.

(Testimony of Arthur Oszman.)

Edwards in Seattle in accordance with the plan outlined in that telegram?

A. No, he failed to arrive and I was in constant touch with the Seattle office and actually spent hours in the office each day, and yet we could not get any further word as to when he may arrive in Seattle or whether he had any reason to come to Seattle. I was in the dark for four or five days, not knowing which way to turn.

Q. Did Mr. Edwards arrive?

A. Yes, about the 29th, I believe, of——

Q. I will ask you whether or not you left Seattle in response to instructions from Mr. Edwards?

A. After Mr. Edwards arrived in Seattle he instructed me to take the first available east bound aircraft to Minneapolis and St. Paul and, possibly, into Chicago and New York. Those plans were tentative at the time I left Seattle. However, I boarded a Northwest plane and surveyed the Twin Cities area as per his instructions——

Q. Surveyed which area?

A. Which I received—I received his instructions at the Olympic Hotel on approximately the 28th or 29th of October.

Q. Mr. Oszman, was Mr. Edwards, as general traffic manager, your superior? [52]

A. He was, yes, and my immediate superior, and at the time in Seattle I had asked him for advance expenses to conduct this survey, he agreed that he would advise the then regional traffic manager in Seattle, Mr. Brockus, to have it available for me prior to my departure on Northwest.

(Testimony of Arthur Oszman.)

Q. What was the amount?

A. \$150 he was going to see that was available. However, the next check with the office Mr. Brockus had not been authorized by Mr. Edwards. Therefore, I cashed a personal check in the office and continued on to Minneapolis, and better than a week later, or ten days later, in Minneapolis I again brought this subject up to Mr. Edwards and he was quite furious and attempted to call long distance to Seattle for the advance expenses.

Q. Did he make such a call?

A. He was unable to because of the congested time of the evening he attempted to place it, so he wired to send Art Oszman \$150 to the Raddison Hotel in Minneapolis. However, in error, apparently, the Seattle office had listed cash outlay as a salary advance and it was deducted off of my next check plus the cost of the wire of the money order sending it to Minneapolis from Seattle; and on frequent occasions—or one occasion with Mr. Edwards in the Washington Athletic Club I brought it up to him and he said he would be glad to discuss them with me at a later date, that he would be coming back from New York at a later date. There were many of those problems he would take up. But I did in letter form request payment of this from Mr. Griffin, as I believed it was in error that they had deducted it from my payroll when it was used as an expense allowance for travel purposes only to conduct the survey for Alaska Airlines in the Midwest area.

Q. Can you state whether or not Mr. Edwards

(Testimony of Arthur Oszman.)

authorized you to incur those expenses and charge them to Alaska Airlines for that purpose?

A. He definitely did.

Q. Was it your testimony that the \$150 advance plus the \$9.00 cost of transmitting the money by wire was deducted from your next pay check? [53]

A. The very next check it was deducted and I was never able to convince Mr. Griffin that it was an error. He just failed to give me any consideration, and as a result on March 13, after many requests, I wrote the letter which was submitted of that date covering a number of other things.

Q. Did you demand reimbursement of \$159.50?

A. By wire. Naturally, I was—I thought it was—I didn't think it was an ethical sort of procedure to use on someone they had constantly traveling for months on their own expenses and I thought it was most inconsiderate of them and merely wanted them to balance it out.

Q. Mr. Oszman, can you state whether or not you were reimbursed for other expenses incurred during this survey trip by Alaska Airlines?

A. Yes, I submitted a great number of them in the Seattle office, as it was the custom there for the men to submit expenses and it was paid out of the division office drawer in Seattle. So, knowing that, I thought it would be a good opportunity to catch up on a bit of mine that were in arrears at the time. So I submitted those available, which were far from being complete.

Q. Were those expenses incurred on the survey trip?

A. Yes.

(Testimony of Arthur Oszman.)

Q. Were they paid?

A. Yes, those I submitted, but they were not submitted in full.

Q. Did you submit this request for reimbursement for the money deducted from your salary check?

A. Oh yes, I asked for that immediately, but Mr. Griffin ignored it, other than sending a burning letter denying it, although I don't know how they figured I would go to Minneapolis on a trip when I was based on some other——

Q. What was your salary?

A. \$400.00 a month plus expenses.

Q. Mr. Oszman, can you identify this paper?
(Handed paper to the witness.)

A. This is a copy of a wire which the general traffic manager, Ben B. Edwards, had sent to the divisional manager in Seattle, Mr. Brockus, in the Joshua Green [54] Building in Seattle, Washington, to forward the \$150 expense money.

Q. To whom? A. To me—Art Oszman.

Q. Is this the original?

A. That is the original. I never during any of my——

Q. Is this the original?

A. No, that is merely a copy.

Mr. Nesbett: We offer this for identification, your Honor.

The Court: It may be shown to counsel for the defendant.

(Mr. Nesbett handed paper to Mr. Kay.)

(Testimony of Arthur Oszman.)

Mr. Kay: Who prepared this copy, Mr. Oszman?

A. That was taken by the girl in the Seattle office from her records from the Seattle office file, which authorized them to make that payment to me in Minneapolis. I obtained that on my return from Minneapolis.

Mr. Kay: When was this copy prepared?

The Witness: Sometime last fall. I believe it was in December.

Mr. Kay: Last fall? That would be the fall of 1947?

The Witness: '46.

Mr. Kay: When was the copy prepared?

The Witness: That trip was made in '46—in the fall of '46 and the copy was prepared in the fall of '46.

Mr. Kay: This copy was prepared in the fall of '46?

The Witness: From the file of the original wire in our Seattle office. It was merely a memo which I wanted.

Mr. Kay: It is not the best evidence, but we have no objection to it.

The Court: It may be admitted and marked Plaintiff's Exhibit No. 12, and it may be read to the jury.

(Plaintiff's Exhibit No. 12 admitted in evidence.)

The Court: What is the date of the telegram?

The Clerk: There is no date, your Honor. [55]

The Court: No date? All right.

(Testimony of Arthur Oszman.)

(Mr. Nesbett read Plaintiff's Exhibit No. 12 to the jury.)

Mr. Nesbett: Mr. Oszman, can you identify this paper? (Handed paper to the witness.)

A. Yes, this is a copy of a wire which I sent to Mr. Griffin in Anchorage shortly after I returned to Seattle because I was most unhappy by having so many deductions from my payroll check and the failure to reimburse me on expenses.

Q. What is the date on that copy?

A. January 17, 1947.

Q. And who signed it?

A. I signed it—signed as A. J. Oszman, Alaska Airlines, Inc.

Q. To whom was the original directed?

A. To J. E. Griffin, Treasurer, Alaska Airlines, Anchorage, Alaska.

Q. Who prepared that copy?

A. My secretary in the Seattle office.

Mr. Nesbett: We offer this copy of a telegram in evidence, your Honor.

The Court: It may be shown to counsel for the defendant.

(Mr. Nesbett handed to Mr. Kay.)

Mr. Kay: About when was this copy prepared?

The Witness: On the date on the righthand side, which is January 17, I believe.

Mr. Kay: The copy was prepared at the same time?

The Witness: Yes, that is merely a copy from my file.

(Testimony of Arthur Oszman.)

Mr. Kay: Your Honor, I am forced to object to the admission of this on the grounds that it is obviously a self-serving document; contains hearsay information.

The Court: Objection is sustained. It may be marked for identification as Plaintiff's Exhibit No. 13 and may be filed.

Mr. Nesbett: Mr. Oszman, can you identify this paper? (Handed to witness.) [56]

A. Yes, this is correspondence from W. R. Lynn, who is assistant to the general traffic manager. It is addressed to Art Oszman.

Q. What is the date on it?

A. December 26, 1946.

Q. Is that the original letter?

A. That is the original.

Q. To what does the letter refer generally?

A. To the salary and expenses which were in arrears.

Mr. Nesbett: We offer it in evidence, your Honor. (Handed paper to Mr. Kay.)

The Court: Is there objection?

Mr. Kay: No objection.

The Court: It may be admitted and may be marked Plaintiff's Exhibit No. 14 and may be read to the jury.

(Plaintiff's Exhibit No. 14 admitted in evidence.)

The Court: Court will stand in recess until ten minutes past four.

(Testimony of Arthur Oszman.)

(Whereupon, recess was had at four o'clock p.m.)

After Recess

The Court: Without objection the record will show all members of the jury present. Counsel may proceed with examination.

The last exhibit has not been read to the jury, so far as I know.

(Mr. Nesbett read Plaintiff's Exhibit No. 14 to the jury.)

Mr. Nesbett: Mr. Oszman, I will ask you whether or not you held an official position with Alaska Airlines in Seattle, Washington?

A. Yes, as their district traffic manager.

Q. When did you enter upon those duties, if you know?

A. I was assigned to Seattle on December 12.

Q. Of what year? A. 1946.

Q. What was your salary as district traffic manager? [57] A. \$400 a month plus expenses.

Q. And what were your duties as general traffic manager—generally?

A. Those were outlined by the—my immediate superior, the general traffic manager, also the president of the company, Mr. Hoppin: Various projects such as one of the main ones was to contact the canner industry people in the Seattle area and to create goodwill among those people, such in the course of those things, taking them to dinner, to lunch or in

(Testimony of Arthur Oszman.)

other words, mingle with them socially, as well as establish a good relationship with other carriers in the area which we had reason to cultivate their friendship and their services because we were merely a connecting carrier in that area and needed their help and aid.

Q. Can you state whether any limitation was placed on your expenses as general traffic manager?

A. No. It fluctuated based on the assignment given me by my superior.

Q. Can you identify this sheet? (Handed sheet to witness.)

A. That is an expense account of mine for the period—the February period, 1947, while in the Seattle office.

Q. And who prepared that statement?

A. I did.

Q. Were copies made?

A. There were copies made and sent to the treasury department as was the procedure.

Q. Treasury department of Alaska Airlines, do you mean?

A. To Mr. Griffin—to the treasury department.

Mr. Nesbett: We offer this in evidence, your Honor. (Handed paper to Mr. Kay.)

The Court: It may be shown to counsel for the defendant.

Mr. Kay: Was this—getting this straight—was this submitted to Alaska Airlines or was it later typed by someone?

The Witness: They were typed off of that, from that original, and the original typewritten was sent

(Testimony of Arthur Oszman.)

to the treasury department as in each case each month. [58]

Mr. Kay: You know of your own knowledge that the original typewritten copy of this particular expense account was submitted to Alaska Airlines?

The Witness: The same method was used in mailing it.

Mr. Kay: Do you know of your own knowledge or not it was mailed and received by them?

The Witness: I do.

Mr. Kay: You do?

The Witness: It was placed in the outgoing basket as all other outgoing mail was handled.

Mr. Kay: Well, I object to the document on the grounds it is not the best evidence.

The Court: Objection is overruled. It may be admitted and marked Plaintiff's Exhibit No. 15 and may be read to the jury.

(Plaintiff's Exhibit No. 15 admitted in evidence.)

The Court: Is it your testimony, sir, that all of the items included on that exhibit represented actual bona fide expenditures made by you on the business of the company?

The Witness: They were requested, just those with the names—they requested the individuals whom I should contact and extend those courtesies to.

The Court: Those expenditures were actually made?

The Witness: Yes, sir. Many more that were never listed through a period of time.

(Testimony of Arthur Oszman.)

The Court: It may be read to the jury.

Mr. Nesbett: We waive the reading unless Mr. Kay insists.

Mr. Kay: I think it ought to be read.

(Mr. Nesbett then read Plaintiff's Exhibit No. 15 to the jury.)

Mr. Nesbett: Mr. Oszman, did you submit expense accounts to Alaska Airlines for the month of December, 1946?

A. Yes, as in previous months from October on and they were honored in a spotty manner, but they were honored with the exception of this and March.

Q. Was the expense account for December similar to the one you have before you?

A. Very much so, yes.

Q. Mr. Oszman, did you submit an expense account for the month of January, 1947?

A. I did.

Q. Was that expense account honored?

A. It was.

Q. By whom? A. Mr. Griffin.

Q. And were you reimbursed for expenditures?

A. Yes.

Q. Do you recall the amount of your expenses for that month?

A. I don't—the actual figure—but it was within, I'd say, probably between \$90.00 and a hundred five would be a conservative estimate.

Q. Mr. Oszman, did you demand reimbursement of the expenses set out in that sheet?

(Testimony of Arthur Oszman.)

A. Yes, I had, using the same method as in previous submissions.

Q. Were you ever reimbursed those expenses?

A. No.

Q. Looking at the first item on this expense account marked 2/1/47, marked "Seattle Transit System Tokens, 50c", what would that represent, activity by yourself on behalf of the company?

A. It was routine in my capacity to make daily contacts with various business field and interests in the Seattle area for the purpose of Alaska Airlines development. The tokens were purchased to be used for short rides within the loop district where it was much easier than to use my personal car and put it in an expensive parking lot where your parking is 35 cents regardless of whether it was a few minutes or an hour's time—it was a cheaper method.

Q. Mr. Oszman, were you traveling around town to any extent? A. Six days a week, yes. [60]

Q. The next item on this expense sheet is marked 2/1, "Dinner Chas. Griffith, Geo. Swanson, \$6.23." What would that represent in the way of an activity on the part of Alaska Airlines?

A. They were of a radio corporation in Seattle and they were shippers of ours. I lived 17 miles from town and it was a daily occurrence of mine on my last stop or in the contacts on my tentative work sheet, I would—I made a habit of inviting those people to lunch, or when I was held over in the loop area beyond normal business hours because of a delayed aircraft arrival, I would naturally have dinner down town and it was not only agreeable by the company,

(Testimony of Arthur Oszman.)

but it was suggested, that I use that method by inviting those people whenever I had an occasion to stay down town, which was about a daily occurrence. As I say, I lived 17 miles from home.

Q. The next items is marked "2/3, Dinner, Dan McMorin, \$4.87." What would that represent?

A. He was the Alaska Passenger Representative for Pan American. Because we had very few facilities in the Seattle area I had to more or less crawl around to those people and create a good deal of goodwill to borrow equipment to turn our ships around. It was a long time until we had enough equipment in that area to turn ships around, and the company executives thought it was reasonable to get that for so little money expended.

Q. I have here, "2/3, Lunch, Martin Geary, R. Harrington, \$3.62."

A. They were also Pan American employees and, as I said, when we had our non-scheduled arrivals at the fields those boys worked different shifts and in order to get the cooperation of them on different shifts it was the procedure to cultivate their goodwill in order to borrow their equipment to use for our turn around.

Q. You would buy their lunch, you mean?

A. Little gestures such as that, so were were sincere——

Q. An item marked: "Lunch, F. Dunbar, \$2.19."

A. He was a Northwest Traffic Representative who had an occasion many [61] times to aid us in transfer of shipments, freight, also various other shipments that he could throw towards Alaska Air-

(Testimony of Arthur Oszman.)

lines in the form—which were revenue raising to Alaska Airlines. They were interline arrangements which we worked out with those folks.

Q. Mr. Oszman, were you instructed by your superior to incur expenses of this nature on behalf of Alaska Airlines?

A. They encouraged that sort of thing, but being a married man I held it down to a minimum as I thought, because I do enjoy family life.

Q. I have marked: “2/17, Lunch, Ross R. Knight, \$1.82.”

A. He was a flight superintendent of Northwest and we did not have a certified flight superintendent in Seattle and I had worked with him for years with Northwest and I had wanted some very important questions answered by him in relation to our ship turnaround, and weather problems which we too experienced on the coastal run which we discussed during the luncheon meeting.

Q. An item marked, “2/23 Sunday, From residence to Olympic, 32 at 5 for conference with MCH, \$1.60.” What would that indicate?

A. As I said, I lived 17 miles away from our office. We were not a scheduled carrier. We were to maintain office hours eight to five. I was responsible for the entire turning around of equipment there, as my title indicates. It was necessary for it was requested by Mr. Hoppin that I install a telephone at Renton, Washington, at my home to protect the company's interest because of an unscheduled arrival time in that area. The mileage marked down there was on a Sunday evening, supposedly days off

(Testimony of Arthur Oszman.)

which we seldom got and nobody was compensated for—I never got compensated for this time over 40 and never requested it, but voluntarily gave it because I thought I was doing the right thing. The mileage there was to cover the use of my personal car from Renton, Washington, to the Olympic Hotel on a Sunday evening at the request of Mr. Hoppin, who was president of Alaska Airlines, for a so-called urgent meeting on a Sunday evening.

Q. Item marked: “w/1 thru 2/28, Parking ramp, \$12.36.” [62]

A. We were instructed by the officers of the company to use a parking ramp, or a parking lot, to be obtained by the month, if we possibly could—which ever would be the cheaper rate—and it would be authorized and absorbed on our expense account as the cars were our own cars, we used them for company business and were compensated on the basis of 5 cents a mile plus parking meter plus parking ramp expenses while in use of the company, which was constant use, as you can see, even on a Sunday evening—it was required the director of the company to drive 17 miles one-way——

Q. An item marked: “1/11 thru 2/11, The Pacific Telephone and Telegraph Co., \$15.21.” What would that represent?

A. Those were because Renton was an incorporated city, yet only 17 miles from Seattle, there was a 10 cents toll charge on each call, and as Mr. Hoppin insisted that I protect the company’s interest and obtain a telephone at the Renton address to be used as company business and to be put on my expense

(Testimony of Arthur Oszman.)

account rather than hire an employee based at the field by the month, he said it would be much cheaper by me getting a telephone and protecting the company's interests from home. Yet he failed to honor any of those; he refused to honor those after I had it installed and had made those commitments. He was not consistent in his policy as were previous officials.

Q. Will you identify that paper? (Handing another paper to the witness.)

A. This is a copy of the March expenses incurred by the district traffic manager.

Q. Is that a copy?

A. That's my copy that I would always write up day by day, or keep notes until I got to the close of the month where then I merely dictated these to the secretary.

Q. To whom was that sent?

A. Sent to Mr. Griffin, the secretary of Alaska Airlines in Anchorage, Alaska.

Q. Was it handled in the usual office manner with respect to mailing?

A. In the usual manner in the outgoing mail basket. [63]

Mr. Nesbett: We offer this in evidence, your Honor. (Handed document to Mr. Kay.)

The Court: It may be shown to counsel for the defendant.

Mr. Kay: This again is a hand written copy, Mr. Oszman. It is your testimony that the original and copies were typed from this?

A. Yes, the original was typed from that.

(Testimony of Arthur Oszman.)

Q. (By Mr. Kay): You say the original?

The Witness: I saw it.

Mr. Kay: And it is the same in every respect as this?

The Witness: It is the same.

Mr. Kay: Except that it is typewritten?

(Witness nodded.)

Mr. Kay: I object to the document as not the best evidence.

The Court: Objection is overruled. It may be admitted and marked Plaintiff's Exhibit No. 16 and it may be read to the jury.

(Plaintiff's Exhibit No. 16 admitted in evidence.)

(Mr. Nesbett read Plaintiff's Exhibit No. 16 to the jury.)

Mr. Nesbett: Mr. Oszman, an item marked "3/10, J. Garrison, \$2.19"—What would that represent in the way of effort on behalf of the company, if you know?

A. Garrison was connected with the express agency there and often was in the position to offer Alaska Airlines air freight which had not been previously designated from the origin and we were able to pick up substantial amount of revenue from sources such as individuals who controlled it as he did.

Q. Were you instructed by your superior to cultivate those types of persons?

A. Yes, very much so.

(Testimony of Arthur Oszman.)

Q. Were you authorized by your superior to purchase meals for them?

A. Yes, they encourage it, and while they were in Seattle with me they would duplicate that same sort of procedure and I accompanied them. It is a [64] common practice in the industry.

Q. Mr. Oszman, this expense account for the month of March is marked: "Total, \$106.88." Did you submit that statement and make demand for reimbursement?

A. Yes, using the regular method.

Q. And were you ever reimbursed that amount?

A. No.

Q. Did you make a demand for the expenses submitted for the month of February I just questioned you on? A. I did.

Q. Were you reimbursed for the expenses for that month? A. No.

Mr. Nesbett: No further questions, your Honor.

The Court: Counsel for the defendant may examine.

Mr. Kay: Does your Honor wish to continue with the cross-examination of the witness at this time? Are you going past five, or not?

The Court: No, we will stop at 5. It is now 23 minutes of 5.

Mr. Kay: Mr. Nesbett has just suggested he has an appointment at 4:30 and I would suggest it might make for better continuity of the cross-examination if we suspended until tomorrow morning.

Mr. Nesbett: I didn't mean 4:30, your Honor. I meant I have an important engagement at five, and if Mr. Kay wants to suspend I am quite agreeable.

(Testimony of Arthur Oszman.)

The Court: My principal anxiety in connection with this case is to finish it tomorrow.

Mr. Kay: I am sure that we can do that.

Mr. Nesbett: It seems almost certain we will be able to, your Honor. My only witness is Mr. Oszman.

Mr. Kay: So far as I know, my only witness is Mr. Griffin.

The Court: We will have to suspend, I think, in the morning for the call of the calendar. However, we will try to take care of it. The trial will be [65] continued until 10:30 tomorrow. Please report at 10:30 tomorrow, ladies and gentlemen. Some other matters are to come before the Court at 10:00, but we will try to be ready to continue the trial at 10:30.

(The Court then duly admonished the trial jurors about discussion of the case, and the trial was suspended at approximately 4:35 o'clock.)

(Trial of the cause was resumed at 10:30 o'clock a.m. of Friday, May 28, 1948:)

The Court: Roll of the jury may be called.

(Jurors in the box were all present.)

The Court: The plaintiff may resume the witness stand.

(Plaintiff resumed the stand.)

The Court: Is there any further direct examination?

Mr. Nesbett: No further questions.

The Court: Counsel for the defendant may examine.

Mr. Kay: Could I see the exhibits, please?

(Testimony of Arthur Oszman.)

Cross-Examination

By Mr. Kay:

Q. Mr. Oszman, when you were testifying yesterday how long did you state that you had lived in Alaska? A. Approximately five years.

Q. And when did you state that you were employed by Mr. Pollack?

A. The agreement was made the latter part of April in 1944, I believe.

Q. And were you living in Alaska at that time?

A. I was.

Q. Your family up here, Mr. Oszman?

A. Due to the war regulations families were not permitted in the Fairbanks area——

Q. Was your family in the Territory?

A. ——was the only reason for their not being here.

Q. Were they in the Territory at that time?

A. No, sir. [66]

Q. They were not? Now, when, if you recall, Mr. Oszman, did you go to work for Alaska Airlines?

A. I was hired during our discussion the latter part of April, but it was necessary to terminate at Northwest's general office in Minneapolis, Minnesota, and it was agreed that, as I said before, the fare was to be covered after that period of employment.

Q. You were working for Northwest Airlines in the Territory at that time?

A. Leased out to the Alaska Wing of the Air Transport Command.

(Testimony of Arthur Oszman.)

Q. But you were employed by Northwest Airlines, leased out—— A. To the Army.

Q. The Army? Now, you state that Mr. Pollack promised you reimbursement for your transportation? A. He did.

Q. Will you state what that conversation between you and Mr. Pollack was, Mr. Oszman—just what he said to you and what you said to him?

A. He merely said that employees, that he urgently needed in those skilled classifications, were covered in that respect if they were—if they proved themselves and had the ability to continue in the employ of the company continuously for a six-month period.

Q. Now, at the time you were employed—this conversation took place in Fairbanks, Alaska, is that right? A. It did.

Q. You were not, then, in Minneapolis, Minnesota, were you? A. No.

Q. And after you were employed you then went to Minneapolis, is that correct?

A. That is right.

Q. You went to Minneapolis and you returned to Fairbanks, is that correct?

A. It was understood with Mr. Pollack it would first be necessary for me to terminate, although I had gone through the preliminary at the Fairbanks [67] Station and had wired in my resignation, in order to start any duties with Alaska Airlines, and the assignment was to be in Juneau, Alaska.

Q. Now, this statement that you have presented

(Testimony of Arthur Oszman.)

here as Plaintiff's Exhibit 1, will you state whether or not that covers your transportation from Fairbanks to Minneapolis or from Minneapolis to Fairbanks?

A. That covers my transportation from Minneapolis Airport—it was purchased in the St. Paul ticket office of Northwest Airlines——

The Court: Will you speak a bit louder?

The Witness: It was purchased in the St. Paul office of Northwest Airlines. However, they have a Twin Cities Airport there, and the origin was old Chamberlain Field, Minneapolis. The destination on the ticket read Fairbanks, Alaska.

Mr. Kay: That doesn't cover your transportation from Fairbanks to Minneapolis, then?

A. No, sir. I was taken to Minneapolis aboard our regular aircraft—Army Air Transport—as a crew member.

Q. Now, as an employee of Alaska Airlines subsequent to May, 1944, Mr. Oszman, do you know of your own knowledge at what time Alaska Airlines established the policy of paying transportation for employees hired Outside?

A. I believe it was a common practice, often——

Q. Do you know when, I asked, they established that policy?

A. Apparently at that time it was in effect because I was putting employees aboard the aircraft at Juneau on that basis, covering their rooms at the Baranof Hotel, many times out of my pocket. I paid——

(Testimony of Arthur Oszman.)

Q. Do you know of your own knowledge any statement of company policy being issued subsequent to that time?

A. That is the only proof I have other than the actual handling of personnel coming up on that basis.

Q. Yesterday you mentioned, Mr. Krug, I believe, and you were unable to recall any other individual? [68]

A. Other than by name, but if Mr. Griffin would be good enough to supply the manifest during that early period I could supply the names and who were supplied in that respect. They should have those records. It is not for me to retain——

Q. Well, isn't it a matter of fact and knowledge to you that policy was not established until 1945, and not——

A. Few things were ever written on the company policy. The organization was young, it was growing, it was subject to growing pains as the industry has been for 20 years' time. Naturally, all things could not be written. In most cases we were, if we had sufficient knowledge of the industry, permitted to use our judgment and we were supported by the officers of the company.

Q. I asked you, isn't it a fact that policy was not established until 1945?

A. It may not have been written, although it had been verbally effective in many cases. I handled them through that Juneau terminal.

Q. I asked you whether or not you didn't know

(Testimony of Arthur Oszman.)

that the policy was established, either verbally or written, in 1945?

A. I assumed it was effective because of handling people on the same arrangement—same basis.

Q. Now, when is the first time, Mr. Oszman, that you demanded the payment of this \$219.30 from Alaska Airlines?

A. As I said, there were so many changes of the officers of the company, not only treasurers but entire organizational changes from the President on down——

Q. I asked when was the first time?

A. When Mr. Cuddy, who was then President of Alaska Airlines, came through Juneau in the capacity of an Alaska——

Q. Who?

A. Mr. Cuddy. I believe you know——

Q. Yes, I know him very well. Now, when was that, if you recall?

A. It was about—an estimate would be midsummer of '44. [69]

Q. Midsummer of '44? About what month?

A. It could have been between June and August—may have been as late as September.

Q. As late as September of 1944? A. Yes.

Q. And what did you say to Mr. Cuddy and what did he say to you?

A. Well, he was naturally, because of his capacity in the company, most vitally interested in progress. We sat in the Baranof Hotel in the office, which was to the left of the lobby, discussed a num-

(Testimony of Arthur Oszman.)

ber of things. He seemed quite elated over some of the progress, and then again with situations on unpaid bills in the area he thought it was a deplorable condition and mentioned to me——

The Court: Can the jurors hear the witness?

Jurors: Yes.

The Court: Very well, you may go ahead. I suggest you speak a bit louder; I would like to hear too.

The Witness: And I told him it was very difficult for me to continue on a basis on which I had previously operated similar offices for Northwest Airlines, lacking not only facilities but available cash to complete commitments which were thrown at me from officers throughout the organization, and, as I said, he thought it was a deplorable situation, made notes of it, but then said he was only on an inactive status and would be happy to pass on the information to someone who was in an active capacity. And I believe he continued Outside on a vacation.

Q. Did you at that time bring to his attention the claim for \$219.30 for transportation from Minneapolis——

A. Very much so. I mentioned the fact and pointed out to him very clearly we did not have so much as an office desk. I pleaded for files in which to keep valuable as well as incidental papers——

Q. I asked about this transportation from Minneapolis: Will you state whether or not you asked him at that time for a check for \$219.30? [70]

A. Not that—it was not due at that time. It was

(Testimony of Arthur Oszman.)

not due until after I had been employed for six months.

Q. I know—you didn't make demand?

A. It was other amounts I was in arrears.

Q. I am talking about there——

A. Not for the fare. It was not due.

Q. All right, when was the first time you made demand for payment of this fare?

A. At the end of the six months' period.

Q. What is the date on this instrument, Mr. Oszman? (Handed instrument to witness.)

A. Well, that is the date that I originated my employment in the Juneau Station.

Q. May, 1944?

A. That is May 4, the starting date as they would indicate on my payroll, I believe——

Q. Well, what is this date?

A. That is the month of travel.

Q. When was this—is there any indication on this at all as to when this bill was presented, or is this a bill—a statement—you presented to Alaska Airlines——

A. That is a copy. No, they had a passenger receipt. Anyone purchasing a ticket has a passenger receipt which is retained. That is submitted to the Treasury Department.

Q. What is that?

A. That is a copy of the total expenditures—my copy.

Q. A copy of what? I am sorry, I just don't understand what that is a copy of.

(Testimony of Arthur Oszman.)

A. That indicates the serial number of the ticket, the point of origin, the destination of the transportation used by Arthur J. Oszman in order to take up employment with Alaska Airlines, as was previously arranged and agreed to by Mr. Pollack. [71]

Q. What is that, now? Is that a thing which was sent to the company?

A. No, the passenger receipt was sent to the company.

Q. You mean a portion of the ticket?

A. Yes. There is always a portion retained.

Q. I know; was it sent to the company with that attached? A. No.

Q. It was just sent?

A. It may have been with a copy similar to this.

Q. Well, do you know what that is a copy of?

A. It's merely a record. I couldn't very well draw a picture of the transportation receipt. This merely identifies my outlay of cash.

Q. When was that instrument made—the instrument made of which that is a copy?

A. That was probably—this one here was taken from the original, naturally, and from other personal files and it was made up at a much later date.

Q. Do you know when it was made?

A. It might have been made as late as a year ago or a year and a half ago. I frequently changed those things, revised the files, consolidated them—

Q. Well, do you have any idea when the original of that instrument was made?

(Testimony of Arthur Oszman.)

A. The original ticket was purchased on that date.

Q. No, not the original ticket—the original of that document of which that is a copy?

A. I would say on this form, possibly, for approximately November to — through, probably, March of '46 or——

Q. It could have been between November and March? A. It could have been.

Q. Didn't you testify yesterday you observed that being made and dictated that and watched it being typed? [72]

A. I said this was merely a copy.

Q. But didn't you say you watched that, how it was made and typed and watched it put in the mail?

A. You are attempting to confuse. You asked me what the purpose of this ticket was. It is merely as a record of transportation used. I could not request payment unless I submitted the passenger's receipt. This is not of any true value; it is merely for my personal records. The importance I don't think is as to the date that is on here. There is no specific date, but there are specific serial numbers which can trace the origin, the purchase and use to destination.

Q. The point I am getting at—I am not trying to confuse you—I recall you testified yesterday you watched that very document of which that is a carbon copy—dictated to your stenographer in Juneau, and that you watched it being put in the mail and you knew of your own knowledge it was mailed. We went over that very carefully, as I remember. Now,

(Testimony of Arthur Oszman.)

you say it could have been any time between November and March——

A. Yes, because I was traveling very frequently from October in 1946 until I was finally assigned to Seattle, to December 12, 1946.

Q. But although you can't remember within three or four months of when that was made, you are sure—you are now testifying as you did yesterday, that you watched it being typed?

A. I did watch it typed, yes. It was in one of those two offices.

Q. But you can't remember when?

A. I think it would be difficult for most people to pin down any one date. It was in one of those two offices.

Q. But you don't know when?

A. During those periods of time, as I said, I was traveling quite frequently——

Q. Yesterday you said it was in Juneau.

A. It could have been. [73]

Mr. Nesbett: Your Honor, I object to that statement that the witness——

The Court: The objection is sustained. You can ask him whether he said Juneau yesterday.

Mr. Kay: Didn't you say yesterday that was typed in your Juneau office?

A. As I said, numerous requests had been made for this type of expenditures. I merely said this was a copy. I had made as high as five and six requests for these expenditures. They have been made all the

(Testimony of Arthur Oszman.)

way from Juneau, Seattle, Kodiak, Anchorage—personally, written——

Q. Do you know when the original of that document was typed, Mr. Oszman?

A. This is merely a copy of an original. Since then there have been four or five originals sent to the Treasury Department.

Q. Do you know when the original of which that is a copy was made?

A. The date isn't clear, but I would say it would be approximately those dates.

Q. Do you know where it was made?

A. Either the Juneau office or Seattle office. I would say the Seattle office on this copy because of—we had a boat strike; there were many things I couldn't get off the dock. As you recall we went for a lengthy period and due to those transfers there was no other method of transportation between Juneau and Seattle. I had many records left in storage, unable to get off the dock in Juneau. Therefore, I was not able to submit some expenses which the Mrs. had put in with other things that we would not need in a hurry and, therefore, were stymied until after the boats began operating the first of the year. When I again compiled these things and attempted to gather them and consolidate them, a great deal was done in the Seattle office, but records of mine were set to go by Mrs. Oszman in the Juneau office during the period I was traveling, and when we knew our transfer was to be effected—and in fact, as I said, she was placed aboard a Pan American

(Testimony of Arthur Oszman.)

Airplane between Juneau and Seattle and her fare was paid by Alaska Air at that time—she failed to carry my records I wanted. As a result they were left until the first boat operated. [74]

Q. I am not sure I followed all of that.

A. Her fare was paid from Juneau to Seattle—she was not an employee—at that time.

Q. All I want to know is if you know when and where this was executed?

A. I believe in the Seattle office.

Q. You believe in the Seattle office? Between what months?

A. It would have to be, I say, either the Seattle or Juneau office; I say it would have been between October and December or January.

Q. This was not executed on the date up here in the right hand corner?

A. I am quite certain that was the date they placed me on the payroll. They were late in placing me on the payroll. That could be the starting date in '44. That date on the left is merely the month of travel. It has nothing to do with the text below it. That is merely a record of my travel and serial number. If in the future I desire to check further to support my claim I could obtain that from the Treasury Department of Northwest Airlines.

Mr. Kay: Thank you, Mr. Oszman. Your Honor, at this time I renew my objection to this document on the ground it is insufficiently identified.

The Court: Motion is denied.

Mr. Kay: Now, you state that this instrument

(Testimony of Arthur Oszman.)

was in your estimation prepared sometime between October of '46 and sometime after that, either at Juneau or Seattle?

A. That one, yes, but I say that is not the first record I had of it.

Q. Well, at that time when it was executed was the original of which this is a carbon copy mailed to Alaska Airlines?

A. Could you repeat the question, please?

Q. Yes. At the time this copy was made, I take it that there was an original over it with carbon paper between; right? A. Yes.

Q. Now, was the original at that time sent to Alaska Airlines?

A. No, it was withheld until other expenses were compiled. As I said, [75] the boat strike affected me gathering those things and having them in one location.

Q. Well, this was not sent to Alaska in October or November?

A. As I recall, there was a group of those sent. As I was able to gather them I submitted them.

Q. Well, if that was sent to Alaska Airlines in October or November of 1946, would that constitute the first time you asked for payment of that claim?

A. No, because I had taken that from other records. That is merely a copy of—taken from the original.

Q. When was the first date, if you can recall, Mr. Oszman, on which you requested Alaska Air-

(Testimony of Arthur Oszman.)

lines to pay you \$219.30 for your transportation from Minneapolis?

A. Was in November of '44.

Q. November of 1944? Now, how did you make that request for payment, Mr. Oszman?

A. We had another set of new officials from the General Manager on down to Vice President, Operations Manager and Treasurer, and as they came through Juneau, naturally, they were interested in their new assignment and it was a request that I made. They said: "Would you please again submit your claim."

Q. Again submit? Had you previously submitted it?

A. Well, because I had had other amounts in arrears, you see. That is not the only claim, Mr.—

Q. I am just talking about this one now, Mr. Oszman. We will get to the others later.

A. That alone, that was the first time.

Q. That was in November, 1944?

A. November, yes.

Q. To whom was the first man you spoke about this \$219.30?

A. I am certain that was Odenwalder.

Q. Odenwalder? A. Odenwalder. [76]

Q. What was his capacity with the company?

A. He was for a time Treasurer and also a traveling secretary for the President at that time, T. N. Law. After he left the active treasury office he still retained a private secretary capacity to T. N. Law, as I recall—he claimed he did.

(Testimony of Arthur Oszman.)

Q. All right, now, where did you make that claim of Mr. Odenwalder? A. In Juneau.

Q. What did you say to him and what did he say to you?

A. He didn't deny it. He said that during his short period of stay in Anchorage that he could readily see how they could be fouled up because there were never permanent records——

Q. What do you mean, fouled up?

A. Because the records in the Treasury Department, there was no set procedure in accounting.

Q. Had you previously made claim?

A. Not on that—not on the fare.

Q. That is what I am talking about. I am talking about the——

A. On previous amounts they were in arrears.

Q. Did you ask Mr. Odenwalder for this fare, \$219.30?

A. I mentioned that would soon be due, because so much other had been so much in arrears, I merely added that because it soon would be due.

Q. Now, at that time you were submitting from time to time expense sheets, were you not?

A. There were two times. Well, there are various times. It all depends on the Treasurer or his assistant or an officer of the company all seemed to have authority to do unlimited things, and being my superiors, naturally, I was forced to follow their directive. They had petty cash payouts, they had—and as they instructed me in the case of beer and whiskey and many items, I should not run them all

(Testimony of Arthur Oszman.)

through on petty cash; they should be broken up so they would appear better on the records. They had numerous instructions which I didn't question. [77]

Q. Did you testify yesterday that you were submitting expense accounts of some kind at the end of each month? A. Yes.

Q. All right. Now, when you go down to November of 1944 did you then include, or begin to include, your \$219.30 on your expense accounts?

A. After the period of time—after the six-month period I did submit the first request for payment.

Q. Did you submit it on these expense accounts?

A. Not on that type of an expense account. Those forms have changed, as I say, frequently, as well—

Q. I will show you Plaintiff's Exhibit 3 and ask you if anywhere on this recap of expenses you claim from Alaska Airlines during the Juneau period—if the item of \$219.30 appears?

A. That is a different type, as I say.

Q. Is it included on that, is all that I ask, Mr. Oszman? A. No, it is not.

Q. Thank you. Now, you say that the first time you discussed this \$219.30 was with Mr. Odenwalder? A. Yes.

Q. In Juneau? And, Mr. Oszman, you stated, I believe, that Mr. Odenwalder didn't deny it?

A. That is right.

Q. Now, when was the next occasion? Did you receive payment of it then thereafter?

A. No, he said things were in such a mess and then they had a fire in the Treasury Department—I

(Testimony of Arthur Oszman.)

don't know just what it was, but for a long time they had asked me in Juneau to contact my contacts which were in arrears—not—my personal one was very small compared to numerous ones around town—and asked me to contact those folks and have them submit their claims because their records were destroyed. I was forced to use that procedure on two different occasions.

Q. When was the next occasion after Mr. Odenwalder's conversation that you asked for payment of this claim? [78]

A. On a trip to Anchorage; I was requested to come to Anchorage by Colonel Castner, who was then General Manager, as I said, within a short time—matters of weeks—sometime—six, seven weeks, they change entire heads of the top of the organization.

Q. Well, did you discuss this \$219.30 with Colonel Castner?

A. Yes, I did. I was directed to come to Anchorage to take over the General Traffic Manager's job. I declined for obvious reasons.

Q. What date was that, Mr. Oszman?

A. I am certain I was brought up here about the 20th or 21st of December in 1944.

Q. 21st of December, 1944?

A. Yes, because I recall that they failed to have equipment, that was flyable, on my return and Colonel Castner guaranteed I could be home for Christmas. It so happened that the only available aircraft, or one that was capable of that route, had

(Testimony of Arthur Oszman.)

run out of engine time and, therefore, he thought that by holding me over the holiday season I would probably like Anchorage and agree to their proposal. However, I refused because I told them I was so much in arrears I didn't think it was an ethical way to handle things and encourage me along other lines. As I said, I am a salesman, yet I can be sold on things. So I told that Colonel, I thanked him and wanted him to give that his attention and I boarded the Pacific Northern plane and charged the fare to Colonel Castner, Alaska Airlines, which he agreed to and had paid, and returned home for Christmas and refused to accept the promotion until those things were righted.

Q. When is the next occasion? Were you there after paid for this \$219.30?

A. Could you repeat that question?

Q. Were you paid then at that conversation?

A. No, as I said, financially they had gone through a number of fluctuating situations where their inability to pay was evident, and I was told to sit tight, that there was new money coming into the organization. Naturally, as I [79] said, the air industry had been my life for a long time. I believed that by being conservative that it would make my job more solid, the organization could grow—I was not belligerent—I was happy with the project; they seemed to be sincere.

Q. When was the next occasion upon which you demanded payment of your \$219.30?

A. I have correspondence in the file there where

(Testimony of Arthur Oszman.)

I contacted the Vice President of the organization, Don Goodman, and had gone over the same situation with him.

Q. You claim that you wrote Don Goodman, the Vice-President of the Organization?

A. Yes, and talked to him verbally in Juneau as well.

Q. When was that?

A. I would say from November on through until about March of the following year. That would be early '45.

Q. Well, could you be more specific about when exactly you wrote Mr. Don Goodman?

A. Yes, I have the acknowledgment there of the letter in the file, and which acknowledged and pleaded with me to hold in my capacity—they would do their utmost to right the situation—because they were just taking over those offices of Vice President on through——

Q. When was that?

A. The letter there has the date. It could be January or February of 1945.

Q. And that was in response to a letter you had written?

A. It was a statement outlining the situation—financial, personal—everything.

Q. That was in response to a letter you had written asking for payment of \$219.30?

A. It was included in more or less of a station report. It included many things. That was one of them.

(Testimony of Arthur Oszman.)

Q. Well, now, when was the next occasion on which you demanded payment of [80] the \$219.30?

A. Well, several times I was—I had made trips for Alaska Airlines and because they were that much in arrears they were advancing money to me. In fact, in the month of May, '45, I made a trip to Seattle for them to set up a communications tie-in between the CAA at Everett and the Fourth Avenue office—I believe it was 1402 Fourth Avenue. They advanced my expenses—the entire amount—at that time, plus my fare both ways and, as I said, they were slowly unpiling the mess.

Q. I just asked you when was the next occasion?

A. It was during that month—that month of May.

Q. What month? A. Month of May.

Q. Month of May, 1945? A. '45.

Q. And to whom did you make that request?

A. To then the new President of the company, which was T. N. Law. He came up here.

Q. And you asked Mr. Law? A. Yes.

Q. For this \$219.30?

A. Yes, along with others.

Q. When was that? That was during that month?

A. Well, Mr. Law had made two or three trips to Anchorage from Oklahoma and California; on those trips he said he had just bought into the company and he naturally was interested in the condition of it and had gotten me in the corner and we had gone over all of those things, from obligations of the company in the Juneau area to my personal

(Testimony of Arthur Oszman.)

accounts in arrears, and he too said they would be taken care of and that ample money was flowing into the company and they would be taken care of and not to be impatient, and I believed him because I believe he was the finest President Alaska Airlines ever had. [81]

Q. What date was that?

A. That was in the spring of '45, because he had made two trips to Juneau pleading with me to come to Anchorage to take over the General Traffic Manager's job with an increase in salary and unlimited expenses.

Q. When was the next occasion you asked for payment of this \$219.30?

A. After I received Mr. Law's proposition on a temporary basis I came to Anchorage.

Q. This was in the spring of '46—'45?

A. That would then be a little beyond the spring. It would be May or June—not later than June 15 or 20.

Q. Now, when you came to Anchorage did you then ask for payment of the \$219.30?

A. Yes. Mr. Law, after our meetings—we had them daily at that time, attempting to iron out the rough situation and on several occasions I had been invited by Mr. Law to go into Mr. Hedman's office, who was then Treasurer of the company—a Mr. Hedman, H-e-d-m-a-n—and it was at that time that Mr. Law asked me to submit the copies of the amounts which I was in arrears and, as I said, I left them on Mr. Hedman's desk.

(Testimony of Arthur Oszman.)

Q. That was about what month?

A. In May—not later than June 20 of 1945.

Q. And with these other statements did you submit a statement for \$219.30 at that time?

A. Yes, there was a statement at that time—it was all grouped on his desk with a rubber band around it.

Q. Now, when did you terminate your employment with Alaska Airlines at that time?

A. It wasn't—I would say, then, in an active capacity, it was on June 30, 1945. I have a check there—a payroll stub—which supports that.

Q. June 30, 1945? A. That is right. [82]

Q. Now, when you left the company at that time did you ask again for the payment of this \$219.30?

A. Yes, but they said so long as I would be so close at hand on Kodiak Island, and through my boss representing them on an agency basis, that they would eventually get to it.

Q. Now, let's get that straight. What was your status with Alaska Airlines, that you claim, after June 30, 1948?

A. I managed a business out of the aviation field in Kodiak, with the power of attorney, and this owner had the Alaska Airlines agency. Therefore, I continued on in that capacity as the owner was absent.

Q. In what capacity? A. As an agent.

Q. Were you on the payroll of Alaska Airlines at that time?

(Testimony of Arthur Oszman.)

A. I was on the payroll in this field where—and—

Q. On Alaska Airlines' payroll?

A. No, my boss was—

Q. Who was your boss? A. Ray Martin.

Q. Ray Martin? A. Ray Martin.

Q. What was his business?

A. Liquor business.

Q. Was he employed by Alaska Airlines?

A. Yes, on an agency basis.

Q. I am asking: Was he employed? You differentiate between employment and agency?

A. An agency has a similar—the obligations are the same.

Q. You mean an agent is on the payroll and received a salary? A. He did.

Q. Mr. Martin received a salary from Alaska Airlines? A. He did. [83]

Q. Now, wait a minute—

A. He did.

Mr. Nesbett: Your Honor, I object to his arguing with the witness. He stated he had.

The Court: Overruled.

Mr. Kay: Isn't it a matter of fact he received commissions?

A. At that time he was on a payroll. He still is on a payroll on a flat basis from Pacific Northern on the same basis as Alaska. Following the cancellation of Alaska's certificate on August 15, 1945, he then, through Art Woodley, got him the same con-

(Testimony of Arthur Oszman.)

nection on the same basis with Pacific Northern Airlines at \$250 a month that is not a commission.

Q. What is it, a flat fee?

A. It was a flat fee.

Q. A flat fee? A. It was a salary because—

Q. A salary?

A. It was a salary because withholding taxes were withheld on each check.

Q. Were you employed on this same basis?

I. I was managing and had an option to buy either half or all of this business and had the power of attorney to act in all capacities. Therefore, then I was tied in very closely with Alaska Airlines, wouldn't you say?

Q. No, since you ask me.

The Court: Do not ask counsel questions.

The Witness: I am sorry.

Mr. Kay: Weren't you employed by Mr. Martin, now, during that period? A. Yes.

Q. You were employed by Mr. Martin?

A. Yes.

Q. And Mr. Martin was on an agency basis with Alaska Airlines? A. A salary.

Q. Agency, didn't you state? [84]

A. You can use the term you like, but it was on a salary.

Q. And you were working for Mr. Martin?

A. That's right.

Q. Now, during that period what demands did you make on Alaska Airlines for the payment of this \$219.30?

(Testimony of Arthur Oszman.)

A. Well, in later months I had reasons for coming to Anchorage—business reasons—and I had called them at the Merrill Field office—contacted them—and they again told me to be patient; that things were still in very much of a muddle.

Q. When was the first occasion on which you made a demand after you left their employment to—

A. I believe it was then probably November of that year.

Q. November of '45? A. Of '45.

Q. And of whom did you make that demand?

A. The treasury department of Alaska Airlines.

Q. Was that in writing?

A. Telephone contacts from the Westward Hotel.

Q. 1945—that was a telephone conversation?

A. Yes, and verbal contacts with Mr. Edwards.

Q. With whom? A. Mr. Ben B. Edwards.

Q. To whom did you speak at that time?

A. I met Ben B. Edwards at that time in Kodiak, who had taken up the—had been assigned as General Traffic Manager for the organization. Possibly those dates—I wouldn't say that it was within a month or so, but those are the people I contacted later on my arriving in Anchorage.

Q. Ben Edwards, then, and who else, if any?

A. And Mr. Perry, who was then Operations Manager.

Q. Mr. Perry? A. George Perry. [85]

Q. Now, were those verbal conversations, Mr. Oszman?

A. Yes, I thought that I would get much further

(Testimony of Arthur Oszman.)

if I took the time to contact them personally. I had had that luck in other fields in collections.

Q. When was the next time that you asked anyone for payment of this \$219.30?

A. On my trips from Kodiak to Anchorage with the same——

Q. Which particular trip, now? About what time? What date?

A. Latter part of March in 1946.

Q. March, 1946? And to whom did you speak on that occasion, Mr. Oszman?

A. I discussed that with Mr. Perry, I am quite sure.

Q. Mr. Perry? A. Mr. Perry.

Q. Was that—did you write him anything at that time, Mr. Oszman?

A. I stopped in his office to see him because he had understood the situation and had been in Juneau and had followed our operation longer than any other department head. He had a more thorough knowledge of it than others who were so frequently changed they were not familiar with their assignment.

Q. Now, when was the next occasion on which you asked payment of this claim, Mr. Oszman?

A. In September of '46.

Q. September, 1946? A. Mr. Perry.

Q. And to whom did you address that demand, Mr. Oszman?

A. On Fourth Avenue; I met him directly on the street.

(Testimony of Arthur Oszman.)

Q. Who?

A. I met him on the street. In fact, he offered me——

Q. Who? A. Mr. Perry.

Q. I am sorry, I didn't hear you.

A. —Who was Operations Manager of the company.

Q. And that was an oral conversation on Fourth Avenue? [86] A. Yes.

Q. Now, when was the next occasion upon which you asked for payment of this \$210.30?

A. The following day, but he said: "We are so limited; by gosh, Art, I realize that, but get down to Juneau as fast as you can. We have only 30 days to operate."

Q. You then went back into the employ of Alaska Airlines?

A. Yes, I was again sold on it. It seemed as though they were sincere.

Q. When was that—when were you employed?

A. I think on the 14th of September. It could have been on the 13th of September, I am not sure—between the 13th and 16th—I am not certain. They have the records.

Q. Now, who re-employed you, Mr. Oszman?

A. Mr. Perry and Mr. Edwards.

Q. Mr. Perry and Mr. Edwards?

A. It was agreed upon by the two of them as we stood in the Alaska Airlines office.

Q. Now, did you have any conversation with

(Testimony of Arthur Oszman.)

them when you were re-employed about the \$2080 you claimed they owed you at that time?

The Court: What sum?

Mr. Kay: \$2008. I mean \$1208.83.

Mr. Nesbett: Where did you get that figure?

Mr. Kay: That is the figure he claims due at that time.

A. I understood it was \$1840.

Q. At that time—you went back to work for them. Now, at that time they owed you this, didn't they, according to this? (Handed something to the witness.)

A. No, plus the other forms which you sent——

Q. They owed you at least——

A. They owed me \$1840.53.

Q. When you went back to work?

A. No, they owed this plus the fare. [87]

Q. And how much is that, Mr. Oszman?

A. That is \$989.63, plus \$219——

Q. \$989.63 plus \$219.80, is about \$1219.43, isn't it?

A. I haven't added it up.

Mr. Nesbett: \$1209——

Mr. Kay: \$1209.43. I will accept the amendment. I am a poor mathematician. Now, at that time you claimed they owed you \$1209.43, Mr. Oszman?

A. They admitted the obligation.

Q. But you claimed that at that time?

A. Naturally, I would continue to claim it.

Q. And to whom did you make claim? What discussion did you have concerning this \$1209.43?

A. With my immediate superiors. Naturally, that

(Testimony of Arthur Oszman.)

is the way those things are most frequently handled. That is the procedure used.

Q. Who was your immediate superior?

A. Mr. Ben B. Edwards.

Q. And what did you say to Mr. Edwards and what did he say to you?

A. Reminded him of those amounts.

Q. This was an oral conversation?

A. Yes, because we had frequent reasons to get together. He was assigning me to various projects.

Q. Well, would you tell the jury just what you said to Mr. Edwards and what Mr. Edwards said to you about this \$1209?

A. He merely said that there was no question about it being due; he would merely have to follow through in the normal channels; that he himself, too, had had problems similar to that and gone month after month without getting collections, so he readily agreed I was right. He was only one of the many who had similar situations.

Q. During this 17-month period you were working for Mr. Martin on Kodiak, did you ever at any time submit a demand in writing on Alaska Airlines for any part of this \$1209? Yes or no? [88]

A. No; verbally, I discussed that with Mr. Edwards in Kodiak.

Q. Did you ever submit any demand in writing on Alaska Airlines during the 17-month period you were working for Mr. Martin in Kodiak?

A. I didn't believe it was necessary at that time because it had been laid on Mr. Hedman's desk in midsummer of '44.

(Testimony of Arthur Oszman.)

Q. The answer is "no," then?

A. Verbally, yes.

Q. Written, no, is that right?

A. Not written at that time.

Q. Did you send any telegrams demanding that payment, Mr. Oszman?

A. No, they would only be charged up to me as other things have been. I used every method of collection prior to that time.

Q. You didn't send any telegrams; you didn't write any letter; is that correct?

A. I had a reason to correspond with——

Q. I just asked: Did you write any letters or send any telegrams? If you want to make an explanation you can make it through your attorney.

A. I wrote many letters.

Q. You wrote letters to Alaska Airlines during that period, asking for payment of this \$1209?

A. You asked me if I wrote letters. I said I wrote many letters.

Q. Did you write any letter to Alaska Airlines asking for payment?

A. At various times.

Q. During this period on Kodiak Island?

A. No, those were verbal.

Mr. Nesbett: Your Honor, he has answered the question once.

Mr. Kay: Will you answer now?

A. Verbally, on Kodiak Island, except on the occasions when I was in Anchorage, which were made on various times which were in order, I believe. I would say that was a duplication of previous

(Testimony of Arthur Oszman.)

correspondence when all those other memos had failed. [89]

Q. I am asking for a statement of fact. You have testified to a number of verbal requests and some telephone conversations. I just asked whether you demanded it in writing? A. Many times.

Q. During this period from the time you left Alaska Airlines' employment until you returned to their employment?

A. Could you repeat that? What period? Specify the exact period?

Q. All right, the exact period: From September 19—wait a minute. When did you leave their employment the first time? A. June 30, 1945.

Q. All right, June 30, 1945, until September, 1946, during that period?

A. Verbal contacts with those individuals who were my immediate superiors.

Q. Verbal contacts? A. Yes.

Q. Not one written request, is that right?

A. They made notes of it to follow through with the Treasury Department.

Q. Did you, yourself, make any written request?

A. No, because they said it would be in the Treasury Department files.

Q. You did say "no," did you?

A. I said they were verbal.

Q. Thank you. Did you talk to a lawyer about this \$1209.80, or whatever it was, during that period?

A. Yes, in the States—a friend of mine.

(Testimony of Arthur Oszman.)

Q. What lawyer did you discuss it with?

A. By the name of—it was while I was back in the States—Tracey.

Q. Tracey? A. Joe Tracey.

Q. Where does Joe have his shingle out?

A. At that time the Commerce Building in St. Paul.

Q. Congress Building in St. Paul?

A. Commerce Building. [90]

Q. When were you in St. Paul, Mr. Oszman?

A. In November of 1946.

Q. November of 1946?

A. That is right.

Q. Well, that's after you had gone back to work for Alaska Airlines?

A. That is right.

Q. Well, did you discuss it with a lawyer during this period when you were on Kodiak Island working for Mr. Martin? A. Yes, I did.

Q. With what lawyer did you discuss it at that time? A. With Talmadge Smith.

Q. Smith? Is he down there at Kodiak?

A. I believe he is. He often came in the store and I told him that I had had that problem. There was nothing pressing about it; but he said that was nothing new, that many of the residents in Kodiak still were not given their passenger refunds on tickets they had submitted to the office, and so—

Q. And so you discussed this with a lawyer at that time? A. Yes, I did.

(Testimony of Arthur Oszman.)

Q. But you didn't file a suit against——

A. There was no need to, because they were very pleasant, but they seemed sincere. But I realize they are still, to this day, in quite a state of confusion.

Q. But you didn't file a suit at that time?

A. No, because I believe they were sincere and would——

Q. All right, let's pass on to your expenses while you were in Juneau, Mr. Oszman: Would you tell us just how this expense account worked, or this——

The Court: Before beginning that, we will take a short recess. Court will stand in recess until 11:30.

(Whereupon recess was had at 11:22 o'clock p.m.)

After Recess

The Court: Without objection the record will show all members of the jury present. [91]

Counsel may proceed with examination.

Mr. Kay: Thank you, your Honor. Mr. Oszman, what was your salary when you were employed by Alaska Airlines?

A. It varied. At one time it was as high as \$500 and expenses.

Q. What was your salary at the time you were employed?

A. The last—the re-employment?

(Testimony of Arthur Oszman.)

Q. No, your first employment at Fairbanks in 1944.

A. It started at 350 and climbed to 500.

Q. Well, now, it started at 350 in May, 1944, is that right? A. That is right.

Q. And when did you receive your first raise, Mr. Oszman? If you remember?

A. On the assignment to Anchorage about—it was either April or May.

Q. April or May of 1945?

A. No, of '44. No, I am sorry—I had spent almost a year in Juneau and then upon going to Anchorage I was given a raise.

Q. So, during the period of your employment in Juneau down until the time you were employed in Anchorage, your salary was 350 a month plus expenses? A. That's right.

Q. Now, at that time, Mr. Oszman, did you have any other employment? Were you working elsewhere?

A. My wife was employed at \$225 a month.

Q. Your wife was employed in Juneau?

A. Yes.

Q. Did you have any other employment, Mr. Oszman?

A. No, but I had income off of two homes in the States.

Q. You had income? Would you mind stating what that income was?

Mr. Nesbett: Object, your Honor—immaterial.

The Court: Objection is sustained.

(Testimony of Arthur Oszman.)

Mr. Kay: Your Honor, could I be heard very briefly?

The Court: Yes.

Mr. Kay: I feel it is material to show what the sources of income of [92] Mr. Oszman were during these periods when he asserts he was able to let the company run up a \$1200 bill on him.

The Court: I think not. We go too far afield if we go into that. The objection is sustained.

Mr. Kay: Now, Mr. Oszman, would you explain to the jury just how this petty cash fund was handled that you had in Juneau?

A. Shall I explain: Is that what you—

Q. Yes, please, will you?

A. Well, on expenditures—incidental expenditures—of the times which they authorized me to expend funds for whatever that was there was a form which those entries were made with the receipts attached; and in addition to that I had personal expense form. In addition to that there were receipts, and pilots often carried the correspondence back and forth. There were three or four or five methods of paid-outs. All were honored by the company.

Q. Well, what I was trying to get at was exactly how this petty cash fund worked. You had a hundred dollar check from the company which was petty cash, is that correct?

A. That was the starting figure, yes.

Q. Now, when you had used that hundred dollars petty cash fund what happened then?

(Testimony of Arthur Oszman.)

A. For any portion of it we would submit that with the paid statements and forward it via ship mail—pilot's pouch—to Anchorage.

Q. Was that only at the end of the month?

A. No, I believe there were times—it depended on the Treasurer; some desired it weekly, others by the month.

Q. Suppose you exhausted the petty cash fund in, let's say, three or four days. What would you do then?

A. It was a combination of personal funds, plus, as they instructed me, or directed me, to withhold my sales reports—my deposits—and take that cash and pay out on refunded tickets—use the tickets refunded—marked "refunded"—to support the lack of cash in order for the sales report to balance. It was [93] most inconvenient and awkward to handle it in that method, but they so directed me to do it.

Q. Well, if the petty cash was refunded—exhausted—in three or four days, wouldn't you then submit a statement, or whatever form supplied, and receipts attached, so the petty cash could be replenished?

A. That is true. However, as I said, the equipment we operated—no one had better equipment, however, weather was so at times when no aircraft operated along the coast for, I have seen, periods of 11 or 12 days in succession. Therefore, even though you submitted them they would be in your outgoing mail basket and never even leave your point of origin for that time. The same was true

(Testimony of Arthur Oszman.)

on the return. So a great deal of time could have elapsed, even though immediate attention were given.

Q. I see. But if the petty cash fund needed replenishing that would be done immediately, three, four or five times during the month?

A. Radio request. As I said, at various times I credited passengers at 102.50 each. They would arrive in Juneau, and that was the time the Maritime Commission controlled the movement of ships but I had the inside information confidentially from company officials, but in very bad weather—unflyable weather—and those groups could get off on boats and their destinations were Anchorage or the interior parts of Alaska, I was often put in an awkward position for the lack of cash in the petty cash or the ability to obtain more, because when weather was unflyable I could not ticket passengers originating in the Juneau area where I could create a new fund, and many times I would request by radiophone through Alaska Coastal—we had an arrangement there and I would direct those requests for funds via radio. Yet, it was impossible to get those funds back because of the elements which prevented it. Weather was one of the greatest——

Q. Now, did your petty cash fund remain the same throughout your period in Juneau?

A. No, because the revenue—I increased the revenue there from the low month of less than \$2000 to a high month of in excess of 18,000. There-

(Testimony of Arthur Oszman.)

fore, with the—you could call it—complaining on my part for more cash to operate, [94] based on the increased revenue, they did increase the cash. However, it was just as insufficient as it had been at a hundred dollars based on a much lower revenue per month—or activity at the station.

Q. What was your testimony yesterday concerning the amount of the petty cash fund?

A. At \$100, to begin with; for months it was 100—it started at a hundred dollars.

Q. Didn't you testify that it was a hundred dollars throughout your period in Juneau?

A. I said, as I recall, for a period of months.

Q. I will show you this and ask if you ever saw the original of which that is a copy?

A. I believe I did. This is January 15, 1945. It came from Colonel Castner's office.

Q. Did you receive the original of which that is a copy, Mr. Oszman?

A. The girl handled the cash in the office. I assume she did.

Q. Well, do you know whether or not your petty cash fund was increased at that time?

A. It was; it would be approximately that time. As I said, it was months and then the upward amount was approved.

Mr. Kay: I would like to offer this in evidence, your Honor, as Defendant's Exhibit 1.

The Court: It may be shown to counsel for the plaintiff.

(Testimony of Arthur Oszman.)

(Mr. Kay handed document to Mr. Nesbett.)

Mr. Nesbett: Did you state, Mr. Oszman, that you did receive the original of which this is a copy?

Witness: No, I said the girl obviously had received it, and——

Mr. Nesbett: No objection.

The Court: It may be admitted and marked Defendant's Exhibit A.

(Defendant's Exhibit A admitted in evidence.) [95]

The Court: It may be read to the jury.

(Mr. Kay read Defendant's Exhibit A to the jury.)

Mr. Nesbett: Is there a date on that?

Mr. Kay: I read the date, 1/15/45. Now, Mr. Oszman, your testimony yesterday—you testified concerning various specific items which you were required to pay in Juneau, and I would like to lay this before you so that you can refer to it, perhaps——

Court: Is that an exhibit?

Mr. Kay: That is an exhibit, sir. That is Plaintiff's Exhibit 3. Now, I believe you—the specific items which you mentioned yesterday, Mr. Oszman, were certain ticket refunds to passengers, is that correct?

A. It had nothing to do with this.

Q. In other words, your ticket refund to passengers had nothing to do with that?

A. No, they were set up on another form altogether. This is merely a notation.

(Testimony of Arthur Oszman.)

Q. Didn't you testify yesterday you sometimes were required to make ticket refunds to many passengers coming into Juneau?

A. Yes, as high as 10 and 20 at a time.

Q. And was that out of your personal funds?

A. That would come with a combination, as I said—withholding the sales reports or the bank deposits plus digging into my personal pocket.

Q. But there is no part of that appears on this?

A. No, these are incidental expenditures such as magazines, beer, such as an aircraft developing mechanical trouble en route at a station at which it was not scheduled to stop, persons other than company personnel directing the mechanics and the pilots requesting some sort of compensation.

The Court: Can you remember to speak louder, Mr. Oszman?

Mr. Kay: Well, now, you mentioned yesterday specifically certain purchases for Yakutat Army personnel, correct? A. Yes. [96]

Q. And I believe that there was a letter admitted as an exhibit, was there not? A. Yes.

Q. In which you were authorized to expend, I believe, \$10.00 per week?

A. Yes. That was based on the number of schedules they were operating at the time. Your schedules fluctuated on an upward basis. Any additional schedules, therefore, would require additional time by Army personnel for Alaska Airlines. The pilots

(Testimony of Arthur Oszman.)

at the time experiencing that sort of thing would request the items from the Juneau office above that figure.

Q. Well, now, Mr. Oszman, one paragraph of that letter reads as follows: "It will be required that a receipt for the articles purchased, which are to be turned over to the pilots for delivery, be obtained for each shipment of merchandise. This receipt should be made out by the District Manager and should be signed by the pilot receiving the merchandise. The receipt so obtained will be attached to the invoice substantiating the disbursement from the petty cash fund." Is that the procedure that was followed? A. Yes.

Q. Now, do any of these items for purchase for Yakutat personnel appear on those accounts?

A. Yes, there were, similar to that—not identical, but similar, as I said, as pilots requested them. Pilots had authority to make more expenditures because we did not maintain company personnel at intermediate points along the route and it was by far the cheaper method of completing our operation.

Q. But it is your testimony that a certain indefinite amount——?

A. Expenditure similar to that, yes.

Q. For Yakutat personnel?

A. And Gustavus.

Q. And Gustavus, were included in that item on the account? A. Yes.

(Testimony of Arthur Oszman.)

Q. Were they substantiated by receipts? [97]

A. They were, and given to the pilots.

Q. But you have lost everything except that slip, is that correct?

A. Well, I had the complete record as late as May or June of 1945 when they were placed on Mr. Hedman's desk—I mean similar to that—as recorded in this recap.

Q. Then it is your testimony, for each one of those months you presented the company with an itemized statement supported by receipts and vouchers, is that correct, Mr. Oszman? A. Yes.

Q. And that you kept, now, no copies yourself, is that correct? A. No.

Q. That is not correct?

A. Other than this recap sheet.

Q. Other than the recap sheet?

A. That is right.

Q. Now, what is the item—the amount—for the first month, Mr. Oszman? A. 74.25.

Q. And do you recall any specific item of expense included in that \$74.00, Mr. Oszman?

A. Oh, I know there were cab bills in there where I was required to go to the field. There were room accounts. There were meals purchased for passengers who were delayed on an involuntary basis.

Q. And that came to that \$74.00 figure?

A. The combination of those items.

Q. What is the figure for the second month, Mr. Oszman? A. \$105.70.

(Testimony of Arthur Oszman.)

Q. Can you recall any specific items in that amount?

A. They were along the same lines such as I say, room expenditures——

Q. You don't recall any specific item, do you—or do you?

A. If I had the monthly statement which the Treasury Department has it would be easy to identify them. [98]

Q. And how about the next month?

A. \$84.00.

Q. Do you recall any specific items there?

A. Well, there were probably laundry charges or items such as that for the CAA at Gustavus where we had paid for the laundry which had been soiled by passengers which we had laid overnight due to weather and attempt to get into Juneau—items such as that, I mean. It was always along the same line. It was company expense for the comfort of the passengers of Alaska Airlines—not personal expenses.

Q. Glancing down the remainder of the months, can you recall any specific items during any of those months?

A. I believe during August—it was either August or September—there was a group of 14 Congressmen of the Aviation Committee that was traveling through the Territory and it was my responsibility to entertain them in Juneau, and I was authorized to expend \$200 or more if it warranted it. I know one amount of 200, or in excess of

(Testimony of Arthur Oszman.)

200, was submitted on another form; but some of these entries here would have come about for cab bills or incidentals as they were given fishing trips, as I was instructed to do by the Chairman of the Board, Mr. R. W. Marshal. He said in all cases, do take good care of those people because in Anchorage we spent \$1300 on them on a banquet alone. It was expenditures such as that I was directed to make. But it is difficult to——

Q. Now, I believe you testified yesterday concerning a telegram received ordering you to purchase certain oil barrels, is that correct?

A. Yes.

Q. Was that, any part of that specific item concerning those oil barrels and that shipment of 50 drums of gasoline included in any of that, Mr. Oszman?

A. I don't believe so. It was just one of the various items of expenditures I was required to make, or to commit the company to——

Q. Yes. Do you believe that any part of that Standard Oil barrel transaction is included in those items?

A. No, none at all. I would say none.

Q. And none of the passenger refunds, is that right? [99]

A. None.

Q. Now, I take it that at the end of the first month there, you submitted an itemized statement to Alaska Airlines and asked for payment, is that correct? Is that your testimony, Mr. Oszman?

A. No, this was—I don't believe so. This was

(Testimony of Arthur Oszman.)

merely a recap. Those were submitted month by month.

Q. Did you submit them month by month?

A. Month by month.

Q. And at the end of the first month you submitted a statement for \$74.00, I believe?

A. Yes.

Q. 74? A. Yes, 74.25.

Q. All right, and what happened then, Mr. Oszman? Did you receive payment for that?

A. No.

Q. So that rode along, is that your testimony?

A. Yes. Yes.

Q. And then at the end of the second month you submitted a statement for how much?

A. 105.70.

Q. And was that paid? A. No.

Q. And that rode along? A. Yes.

Q. Now, at the end of the third month you submitted a statement for how much? A. \$84.00.

Q. And was that paid? A. No.

Q. And during the months thereafter you submitted statements in the amounts on that recap, Mr. Oszman, is that your testimony? [100]

A. That's right.

Q. And none of those were paid?

A. They were not.

Q. Now, do you know whether or not any of those—I believe there is a blank space on these expense sheets, is there not, Mr. Oszman? I will show you Plaintiff's Exhibit 16, purporting to be a

(Testimony of Arthur Oszman.)

copy of an expense sheet. Is there a space on there in the middle of the page for approval by a company official—right down at the bottom of the middle of the page? A. There is.

Q. Now, do you know whether or not any of these expense accounts which you submitted, which you state that you submitted during this period, do you know whether or not any of those were ever approved in that space by a company official?

A. I had never seen them after they were submitted. Those payments which I received I merely received the check.

Q. What payments were those, Mr. Oszman?

A. Oh, I received, as I said, on several trips I was given my expenses in advance. I merely filled out those forms to balance with the funds which were given in advance.

Q. I think you testified that you never saw them again—these statements which you submitted for the recap, is that correct?

A. Generally, you don't see them again.

Q. But did you see those again?

A. Of my copies?

Q. No, the originals you submitted to the company? A. The originals, no.

Q. So you don't know of your own knowledge whether or not they were approved by company officials?

A. They verbally committed themselves.

Q. Do you know whether or not the proper company official wrote on the sheet "approved" and put his initials on it, Mr. Oszman? [101]

(Testimony of Arthur Oszman.)

A. I don't know whether they had or not.

Q. Now, after you failed to receive your payment for the first month, Mr. Oszman, what—did you write any letters to any company officials asking for payment of that amount?

A. I said they were frequently coming through Juneau——

Q. Did you write any letters.

A. Notes on the "Avoid Oral Instructions" form, such as was the company procedure.

Q. Do you have any copies of those notes you wrote?

A. You don't usually make copies of those "Avoid Oral Instructions." There is just the original.

Q. There happen to be copies of at least two of them around here, Mr. Oszman.

Mr. Nesbett: Where are they?

Mr. Kay: One was just admitted as an exhibit, Mr. Nesbett. But other than these notes which you state you wrote on the "Avoid Oral Instruction" card, did you write any letters to the company asking for payment? A. Yes, I had.

Q. You did? To whom did you address those letters?

A. To the department heads. One was Colonel Castner.

Q. When did you write Colonel Castner?

A. I don't recall the date, but it was in the fall.

Q. Of what year? A. '44.

(Testimony of Arthur Oszman.)

Q. Fall of '44? A. That's right.

Q. And what did you say to Colonel Castner in that letter, Mr. Oszman?

A. Merely reminded him of those expenses which I had incurred which he had in written form authorized me to make and failed to acknowledge in the form of checks. [102]

Q. You say Colonel Castner authorized you to make those expenditures in written form?

A. Yes, there is correspondence in the file where he directs me to do that sort of thing.

Q. Not in evidence in this case, is it?

A. It is in the file.

Q. But is not in evidence in this case?

A. Not at the present time.

Q. It wasn't introduced during your direct testimony? A. No, sir.

Q. Now, you wrote a letter to Colonel Castner some time in the fall, is that right?

A. Oh, I believe it was an "Avoid Oral" form, similar to the one you had.

Q. Was that in your handwriting or on the typewriter?

A. That was typewritten, as I recall it.

Q. Did you make a carbon copy of that, Mr. Oszman? A. I don't believe so.

Q. Well, now, when was the next time that you made a written request on a company official for payment of these sums which were accumulated? A. I don't recall the dates.

Q. Do you recall making any further written re-

(Testimony of Arthur Oszman.)

quest on the company for payment, Mr. Oszman?

A. I had at later dates. I don't recall the——

Q. You say at later dates?

A. At later dates I had written letters.

Q. To whom were those letters written?

A. To the department heads.

Q. What department heads?

A. At one time, the Traffic Manager was Phil Seno.

Q. You wrote who? [103]

A. Phil Seno.

Q. About when did you write him, do you remember?

A. It was probably in—oh, it might have been August—September.

Q. Of what year? A. Of '44.

Q. '44?

A. Or November—as late as November, it would be.

Q. August to November, some time during that time, you say you wrote Phil Seno?

A. I am quite certain of it.

Q. And was that on an "Avoid Oral Instruction" form?

A. Yes, on the forms we generally use for that type of——

Q. Was that typewritten?

A. I am certain it was.

Q. Did you keep a carbon copy of it?

A. No.

(Testimony of Arthur Oszman.)

Q. When was the next time you wrote anybody and asked for payment, Mr. Oszman?

A. It would have been, I imagine—as I said, it was in December that I made the trip to Anchorage and contacted him direct. It would be in the spring, then.

Q. In the spring? Now, to whom did you write on that occasion, Mr. Oszman?

A. It was either to Harold Nordman or Hazle Rich, who was in charge at that time.

Q. Harold Nordman? A. Nordman.

Q. Nordman? And this is in the spring of 1945?

A. I'd say approximately that.

Q. What month? Could you pin it down that close?

A. It is difficult without the forms.

Q. Well, the spring of 1945? [104]

A. Yes.

Q. Now, what did you write that letter on, Mr. Oszman—"Avoid Oral" request?

A. Most any interoffice correspondence blanks which we had. I mean it could be various times.

Q. Did you keep a carbon copy of that letter?

A. No, we were in the habit of just putting them in the envelopes in the outgoing baskets—merely reminder——

Q. But you didn't keep carbon copy?

A. No, because I had an accurate check.

Q. Well, when was the next letter you wrote demanding payment, Mr. Oszman?

A. I probably—in May of '45.

(Testimony of Arthur Oszman.)

Q. May of '45? And to whom did you write on that occasion? A. To T. N. Law.

Q. T. N. Law? And was that also on an informal form?

A. Yes, in company mail—no stamps—merely thrown in company mail.

Q. And what did you say to Mr. Law in that letter? In May, 1945?

A. Merely inquired as to how—what progress was being made with my personal situation there regarding the funds in arrears at Juneau that we had discussed on several occasions while he was in Juneau.

Q. At that time how much did you claim they owed you, Mr. Oszman—in May, 1945?

A. That would be 989.63.

Q. Plus the 219.80?

A. By that time it was due, yes.

Q. So you wrote Mr. Law this little note asking for payment?

A. Yes. Mr. Law was President, as I recall, at that time.

Q. When did your employment end, June 30?

A. June 30 of 1945.

Q. Did you make a written demand on the company for payment at that time, Mr. Oszman?

A. No, because I was conveniently located here in Anchorage and had reasons to be at the Treasury Department almost on a daily basis. [105]

Q. In the Treasury Department on a daily basis then?

A. Almost; the offices were consolidated at that time. Our offices were at the field.

(Testimony of Arthur Oszman.)

Q. And were you getting a little worried about your \$1209?

A. No, because Mr. Law assured us that there was so much new money in the Company that things would come along all right.

Q. Now, you were earning, were you not, \$4200 a year?

A. It had been increased then to \$6,000.

Q. But that was after you came to Anchorage, was it not? A. That is right.

Q. That last six weeks?

A. Yes, he compensated me in that respect, which was a fine gesture on his part, and if it were not warranted——

Q. During those previous months that you had been employed, 350 a month? A. Yes.

Q. And the company now owed you \$1209, is that correct?

A. Approximately that figure, yes.

The Court: I think we will suspend now. The trial will be continued until two o'clock.

(The Court then duly admonished the trial jurors about discussion of the case, and recess was had at 12:05 o'clock p.m.)

Afternoon Session

The Court: Roll of the jury may be called.

(Jurors in the box were all present.)

The Court: Plaintiff may resume the witness stand and counsel may proceed with examination.

Mr. Kay: Now, I believe, Mr. Oszman, that you

(Testimony of Arthur Oszman.)

testified that when you were re-employed in September of 1946 you were to spend some time in Juneau, is that correct? A. Yes. [106]

Q. And I believe you testified that you flew down to Juneau on a proving flight of Alaska Airlines, is that correct? A. That's correct.

Q. But that your wife flew down aboard PNA, is that correct? A. That's right.

Q. And I believe that you testified that you later requested payment of your wife's fare to Juneau? A. That's correct.

Q. Do you recall when you first submitted the request for that payment, Mr. Oszman?

A. I don't recall the exact date, but I am sure it was following the series of trips which I was making for the company.

Q. In other words, it was following your trips to Minneapolis and St. Paul?

A. Yes, I believe it would be in the period of December—probably be the earliest that I got back to that.

Q. Then you believe you submitted a statement to Alaska Airlines requesting the payment of the \$80.50 for your wife's fare to Juneau some time in December? A. Yes, to Ben Edwards.

Q. To Ben Edwards? A. Yes.

Q. Now, was that some kind of a printed statement?

A. It was a note in the company envelope, sent aboard the aircraft mail—pilot's pouch is what we termed it.

(Testimony of Arthur Oszman.)

Q. Was it a statement in this form, Mr. Oszman? I am showing you Plaintiff's Exhibit No. 7.

A. No, this is a copy of my record of the expenditures. It was not in that form.

Q. Well, is this a copy of—I think you said, of your record of the expenditures? [107]

A. It is a copy of my record.

Q. Was the original, of which this is a copy, sent to Alaska Airlines? A. Not to Mr. Edwards.

Q. To anyone in Alaska Airlines?

A. To the Treasury Department.

Q. Do you know when the original, of which this is a copy, was sent to the Treasury Department?

A. Later on at the end of that year or the following two or three months.

Q. Would it be as late as March, 1947?

A. It could be. It could have been.

Q. Up until that time, then, up until March of 1947 would the Treasury Department have been notified that you expected them to pay the \$80.50 for your wife's transportation?

A. They should have been advised.

Q. By whom?

A. By my immediate superior.

Q. Who was your immediate superior?

A. Mr. Edwards.

Q. In other words, you had written Mr. Edwards a note, I believe you said? A. Yes.

Q. On the interoffice memo? A. Yes.

Q. Was a carbon copy made of that?

(Testimony of Arthur Oszman.)

A. I don't believe so. If it was I think it would be in the Seattle office.

Q. And on the basis of that you believe Mr. Edwards would tell the Treasury Department to pay you this \$80.50, is that the idea?

A. Yes, because they had occasion to come into Seattle—they had acknowledged receipt of it——

The Court: Can the jurors hear the witness?

Jurors: Very slightly. [108]

The Court: Well, if you want your story heard you had better talk louder.

Mr. Kay: I was asking, Mr. Oszman, if you expected Mr. Edwards to inform the Treasury Department of this amount that you claim for your wife's transportation?

A. Yes, because it was a procedure we used, submitted them through our department heads as they were the ones who originally authorized that type of expenditures.

Q. And it is also your testimony that a statement which would come to the Treasury Department's attention direct might have been sent as late as March, 1947? A. Yes. Yes.

Q. I believe you testified yesterday that you made only one demand for that payment, is that correct? A. I believe so.

Q. Now, when did you first make demand on the company for the payment of the Gastineau Hotel bill for you and your wife?

A. That was upon the completion of the trips on the survey back into the midwestern area, as

(Testimony of Arthur Oszman.)

that was part of my file that remained in Juneau and it was delayed in reaching Seattle because of the fact it was in with some of our belongings that were shipped by boat.

Q. Mr. Oszman, I will show you Plaintiff's Exhibit 8, the Gastineau Hotel bill, and I will ask you, first, do you observe anything about the date in the upper right hand corner of the statement?

A. Yes, I do. It's 1947.

The Court: I wonder if counsel would mind standing back further—back on the other side of the table or near the end of the jury box, so that the witness will be compelled to raise his voice in order to make counsel hear.

Mr. Kay: Thank you, your Honor.

The Court: Then the rest of us may be able to hear. Counsel may sit down if he desires, but I would like to have him get quite a ways away from the witness. [109]

Mr. Kay: I will be glad to stand. I will just have to transfer these papers. Now, I was asking Mr. Oszman, when was the first occasion on which you presented that hotel bill to the Treasury Department or to the Alaska Airlines—anyone—for payment?

A. It was either in December or the first few months of '47. This was requested from the secretary of the Baranof Hotel who had, at the time of our stay, been a room clerk at the Gastineau, and in transit these were billed on a weekly basis and grouped in our luggage and I believe this is a

(Testimony of Arthur Oszman.)

paid statement which is taken from their records and I use this as support to the claim as I paid this on a weekly basis. This is a total expenditure during our stay there.

Q. Glancing at the date in the upper right hand corner, Mr. Oszman, would it be your impression in looking at that that the "7" on the end of the "1947" had been changed?

A. It looks as though it had been, or heavily marked in.

Q. In other words, the "7" is marked in, apparently, with pencil? A. That is right.

Q. And how about the date which appears down farther, has that apparently been changed also?

A. Yes.

Q. Do you have any idea who or why that change was made?

A. I believe that the girl explained that in her letter. I had asked for the compiling and total of that expenditure in Juneau. She supplied it, and I believe those are her figures or markings on this statement—this paid statement.

Q. Did you ever include the Gastineau Hotel bill on any of your expense accounts to the company, Mr. Oszman?

A. I had previously on the other hotel in Juneau—the Baranof.

Q. Did you include this item in the expense account? A. Not to my knowledge. [110]

Q. Could it be that the first time that this bill

(Testimony of Arthur Oszman.)

was presented for payment was at about the time you wrote those letters, March 10 and 13?

A. I—I am not certain.

Q. Could it be that it was that late?

A. It could have been, as I explained before the reason for it.

Q. Well, now, Mr. Oszman, who was the Comptroller or Treasurer of the company at the time you were re-employed in September of 1947?

A. I believe it was Mr. Griffin.

Q. Do you know Mr. Griffin?

A. Only as a business acquaintance.

Q. In your capacity as an employee of Alaska Airlines did you ever have any conversations with Mr. Griffin between the time you were re-employed and the time you terminated the second time?

A. In Seattle.

Q. And how much conversation did you have with Mr. Griffin?

A. Not more than one in the Seattle area.

Q. Well, anywhere?

A. Not during that period of time.

Q. From the time you went back to work until the time you quit, only saw him once.

A. Only recall once.

Q. Now, what was the occasion on which you saw him that once?

A. It was while he was waiting over for a plane connection eastbound to New York. There were a number of things he wanted to discuss, but because of the—he was being pressed for time, he

(Testimony of Arthur Oszman.)

said that he would discuss all those station problems upon his return from New York.

Q. About what date was that, if you recall, Mr. Oszman?

A. Just before the Christmas holidays, I would say—approximately.

Q. Just before Christmas of 1946?

A. Yes.

Q. Well, now, did you on that occasion bring to Mr. Griffin's attention [111] the fact that you had a claim against the Alaska Airlines of quite a considerable standing in the amount of somewhere around \$1200?

A. Not at that time because of appearing so busy and volunteering to spend the amount of time required to go over any problem we had upon his return.

Q. Then you did not mention the amounts that you claimed were due from Alaska Airlines to Mr. Griffin, the Comptroller or Treasurer of the company on this one occasion you saw him, is that correct?

A. As I recall it I did not.

Q. Now, did you, during the time of your second period of your employment have any occasion to write Mr. Griffin?

A. Yes, in December—not written, it was a wire.

Q. Sent Mr. Griffin a wire? Well, now, is that the wire which was, I think, offered in evidence yesterday but not admitted?

A. I believe it was.

(Testimony of Arthur Oszman.)

Q. Now, did you at any time during the second period of your employment write Mr. Griffin a letter, either requesting or demanding payment of any of the sums due you?

A. Yes, approximately the 13th of March in '47.

Q. March, 1947? A. '47.

Q. That is the first time that you wrote him, is that correct? A. That's true.

Q. Other than the telegram to which we just referred—the one which was offered yesterday—did you send him any wires during that period requesting payment? A. No, now——

Q. Now, *Mr. Griffin*, at various points of your testimony you have referred to various persons. You have referred to Mr. Odenwalder. Is Mr. Odenwalder still employed by Alaska Airlines, if you know?

A. I don't think directly. He may have stock.

Q. Is Mr. Castner still employed by Alaska Airlines, if you know? A. Not to my knowledge.

Q. Mr. Law? A. As a director.

Q. Is he still employed?

A. As a director.

Q. He is a director of the company at the present time? A. I am quite sure.

Q. How about Mr. Hedman, is he still employed?

A. Not to my knowledge.

Q. How about Mr. Ben Edwards, is he still employed? A. I am not certain of that.

Q. How about Mr. George Perry, is he still employed? A. I don't think so.

(Testimony of Arthur Oszman.)

Q. How about Mr. Phil Seno, is he employed?

A. Not to my knowledge.

Q. How about Mr. Harold Nordman, is he still employed? A. I don't believe so.

Q. In other words, as far as you know, none of the gentlemen with whom you had these verbal conversations are still employed by Alaska Airlines, is that correct? A. That is true.

Q. Now, Mr. Oszman, you testified yesterday concerning your trip to Seattle at the request of Mr. Edwards, and from there on to Minneapolis and St. Paul, correct? A. That is true.

Q. And I believe you testified that Mr. Edwards wired from Minneapolis and had your Seattle office—the Seattle office of Alaska Airlines—send you \$150, is that correct? A. He did. [113]

Q. Now, did you receive that \$150?

A. I did.

Q. And was that \$150 an advance on expenses?

A. An advance on expenses, yes.

Q. Advance on expenses? Now, did you thereafter—after your return from Minneapolis and St. Paul—present an expense account or an accounting showing how you spent the \$150?

A. I had spent far greater sums than that prior to the arrival of the 150, and the 150 was absorbed during that project.

Q. Did you present any expense account covering that \$150? A. Yes, I did.

Q. You did? A. Yes.

Q. When did you present that?

(Testimony of Arthur Oszman.)

A. To cover that period of the trip.

Q. Well, when did you present it?

A. I believe it was at the end of November.

Q. Was that November expense account honored and paid? A. It was.

Q. The November expense account, including this \$150, was honored and paid, correct?

A. The 150 was not honored.

Q. I thought you said it was included in your expense account?

A. It was included, yes, and it was paid and then deducted from the following pay check.

Q. In other words, at a later time Mr. Griffin notified you that he was not allowing the \$150 and deducted it from your payroll, is that correct?

A. After he had approved and the check was in my hands covering that same expense—approved and sent to me.

Q. Now, let's see how this worked: You were then in Seattle, were you not? [114]

A. I returned to Seattle, yes.

Q. When you returned to Seattle isn't it a fact that you would withdraw funds from the petty cash funds in the office and then submit an expense account justifying them?

A. No, sir, I never had that opportunity in the Seattle office. It was not my home base.

Q. Wasn't it your home base after you went there from Juneau? A. No, sir.

Q. In the fall of 1946?

A. Not until December 12, 1946.

(Testimony of Arthur Oszman.)

Q. Well, when did you make the trip to Minneapolis?

A. I believe it was the 28th or 29th of November—of October—1946.

Q. You went there from Seattle, did you not?

A. From Seattle.

Q. And you returned to Seattle from Minneapolis, did you not?

A. And then to Juneau.

Q. Then back to Juneau?

A. Which was a temporary base.

Q. You went from Juneau to Seattle; from Seattle to Minneapolis; from Minneapolis to Seattle and back to Juneau, is that correct?

A. To Seattle; and permanently assigned to Seattle, yes.

Q. I get it. All right, now, when was the deduction from your pay check made, Mr. Oszman?

A. On the next pay period.

Q. Are you sure of that?

A. Definitely. I have the payroll stub.

Q. The next pay period after your return from Minneapolis? A. That's true.

Q. Isn't it a fact that the payroll deduction was made on January 15, 1947?

A. The payroll stub has the definite date of the withholding amount, or the amount withheld, rather.

Mr. Kay: Your Honor, would it be proper for the purpose of refreshing the witness' recollection to show him an exhibit which has been marked for

(Testimony of Arthur Oszman.)

identification only and not admitted in evidence—just to refresh his memory?

The Court: You may show it to him if you desire.

Mr. Kay: I show you this telegram, Mr. Oszman and ask you if that refreshes your recollection as to when the payroll deduction was made?

A. That's on January 17.

Q. Now, I believe you testified yesterday that in your capacity as District Traffic Manager in Seattle you were paid a salary of \$400 per month and expenses, is that correct?

A. That's correct.

Q. And I will show you Plaintiff's Exhibit 14 and ask you if that refreshed your recollection as to when that salary increase was made?

A. It was to have applied in Juneau but was not effective until I was assigned to Seattle, as he admits here, which was a company error.

Q. Let me ask you if Plaintiff's Exhibit 14, which might be somewhat ambiguous to the jury, refers to anything other than the adjustment in your salary check to take care of this increase in salary from 350 to 400?

A. I don't believe there is.

Q. That refers only to that increase in salary, is that correct? A. That is correct.

Q. It occurred to me there might be some question in the jury's mind about that point. This is the letter from W. R. Lynn, which the jury may recall was read, addressed to Mr. Oszman stating

(Testimony of Arthur Oszman.)

that the "information contained in your letter dated December 20, * * * has been passed on to the Accounting Department with a request that an adjustment be made on your salary and included in the forthcoming check" and goes on like that. I thought there might be some confusion as to other claims which Mr. Oszman—Mr. Oszman, when you got to Seattle in December did you, at the end of December, submit an expense account to the Treasury Department of Alaska Airlines? [116]

A. Yes, they were submitted by each month.

Q. And was that expense account honored and paid? A. It was.

Q. How about January, did you submit an expense account? A. It was.

Q. Was that expense account honored and paid?

A. It was honored and paid.

Q. Now, as a matter of fact, by "honored and paid"—you had previous to submitting the expense account, reimbursed yourself out of funds in the Seattle office?

A. I never had access to the Seattle funds.

Q. In other words, it is your testimony that those expenses were paid by you out of your pocket and you then sent a statement to the Alaska Airlines and they sent you a check, is that correct?

A. That is true.

Q. For December and January?

A. That is true.

Q. Now, did you, toward the end of January,

(Testimony of Arthur Oszman.)

receive a notice of any kind from Mr. Griffin concerning your expense accounts?

A. I had no directive from Mr. Griffin.

Q. You didn't receive a notice from Mr. Griffin of any kind? A. In January?

Q. In either February or January—December or January?

A. I personally received none from Mr. Griffin.

Q. Did the Seattle office receive any?

A. I couldn't say. I was in charge of the Seattle office, but nothing had been directed to me personally from Mr. Griffin.

Q. Do you know—what was the name of the employee? Do you know whether or not Mr. Brockus received any notice from Mr. Griffin concerning the use of the petty cash fund in the Seattle office? [117]

A. That I do not know.

Q. Do you know whether or not Mr. Brockus received any information?

A. I am not certain of that. I know I received none.

Q. Following the end of January did you draw any funds out of petty cash, or otherwise, in the Seattle office?

A. There was a time during Mr. Hoppin, the President's, stay, when the expense accounts were delayed because of Mr. Griffin's trips, I believe, Mr. Hoppin stated. He authorized a small amount advanced to me as we had some cannery connections contacts to make. There's probably one or two

(Testimony of Arthur Oszman.)

he authorized out of that office—not myself—they were authorized by the President of the company.

Q. So now, after—did you submit an expense account for February, 1947? A. I did.

Q. Was it paid? A. No.

Q. Did you submit an expense account for March, then?

A. I submitted one for March.

Q. And was it? A. No.

Q. All right. Now, when was the first day, Mr. Oszman, that you knew that you had been terminated by Alaska Airlines?

A. Well, it would be between the 10th and as late as the 15th of March.

Q. Between the 10th and the 15th?

A. And the 15th of March.

Q. Is that correct?

A. I had rumors of it.

Q. You had heard rumors of it? A. Yes.

Q. Previous to it, is that correct?

A. Not prior to the 10th, but between the 10th and 15th of March. [118]

Q. Did you see Mr. Marshall Hoppin and Mr. Lynn on a trip to Seattle the end of February or first of March, 1947, Mr. Oszman?

A. I saw Mr. Hoppin in Seattle on, as I recall, the third, fourth, fifth of March.

Q. Mr. Lynn with him?

A. I don't recall Mr. Lynn.

Q. Well, isn't it a matter of fact that Mr. Hop-

(Testimony of Arthur Oszman.)

pin and Mr. Lynn were in Seattle either the last week in February or the first week in March and that Mr. Lynn informed you at that time that you were separated effective in about two weeks or so?

A. No, sir.

Q. You deny it? A. That's true.

Q. So that the first time you heard any rumor that you would be terminated was on or about March 10? A. That is true.

Q. And so that you had heard a rumor of your termination at the time that you wrote these two letters which you offered in evidence yesterday on March 13?

A. It was about that time, yes.

Q. When you addressed those letters to Mr. Griffin you knew that you had been terminated, is that correct? A. I wasn't certain.

Q. But you had heard a rumor to that effect?

A. Yes.

Q. Had you ever previously, Mr. Oszman, at any time, made any demand, oral or in writing, or Mr. Griffin, the Comptroller or Treasurer of Alaska Airlines, for payment of any part of the account due you? A. In March of '47?

Q. In March of '47 is the first time, is that correct?

A. The first opportunity. [119]

Q. That is the first time?

A. First opportunity, yes.

Q. Mr. Griffin was Treasurer or Comptroller of the company at the time you were employed by

(Testimony of Arthur Oszman.)

Alaska Airlines in September of 1946, was he not?

A. I am certain of it.

Q. And he was Treasurer or Comptroller continuously from the time you were re-employed the second time down to the time you were terminated, was he not?

A. That is true.

Q. And the first time you made any demand on him was in March, 1947, is that correct?

A. That is true.

The Court: Is there any further direct examination?

Mr. Nesbett: Yes, your Honor. May I have a moment, please?

The Court: Court will stand in recess until 2:40.

(Whereupon recess was had at 2:35 o'clock p.m.)

After Recess

Redirect Examination

By Mr. Nesbett:

Q. Mr. Oszman, what period of time were you at Kodiak acting as agent for Alaska Airlines?

Mr. Kay: I object to that question, your Honor. The witness was not acting as an agent for Alaska Airlines. He was working for a man who was acting as an agent.

The Court: Objection is sustained.

Mr. Nesbett: Well, what period of time were you in Kodiak, Mr. Oszman?

(Testimony of Arthur Oszman.)

A. From the second day of July, 1945, until April of '46.

Q. And can you state why you did not make written demand upon Alaska Airlines for reimbursement for the 1200 some odd dollars you claimed they owed you?

A. Because on my trips to Anchorage I brought it to their attention by telephone contact or personal contact with the officials. [120]

Q. Is it a fact that during that period your detailed expense sheet and the demand for reimbursement for the \$219.30—records of all that were in Alaska Airlines' office?

A. They had been since May or June on the Treasurer's desk.

Q. Mr. Oszman, were you promised reimbursement by any official of Alaska Airlines for the cost of your wife's transportation to Juneau?

A. By both Mr. Perry and Mr. Edwards.

Q. And where was that promise made, if you recall?

A. On the day that I was rehired by them.

Q. Where was that?

A. In the office on Fourth Avenue—the traffic office.

Q. Did you ask them specifically if they would reimburse you for the cost of her transportation to Juneau?

A. Yes.

Q. Did you ask them—did they ever at any time promise to reimburse you for hotel expenses incurred in Juneau?

A. They did.

(Testimony of Arthur Oszman.)

Q. Where did that promise take place?

A. At the time that I was rehired they knew that those expenses would be incurred, that Juneau would be a temporary location and that they would be subject to those additional costs.

Q. And was it at that time that they promised to reimburse you for those unusual expenses?

A. They merely said to submit them in the normal manner.

Q. Mr. Oszman, can you state why you did not make a written demand for reimbursement from Mr. Griffin after you were rehired and during the time you were in Juneau?

A. I had made a verbal request to Mr. Bartoo, I believe, who had made a trip in there, who had considerable accounting experience, but was a Vice-President of the company at the time of his visit during that month.

Q. I asked you why you didn't make a written demand upon Mr. Griffin during that period? [121]

A. Because I assumed that the available information was still on file in the Treasury Department where it had been left.

Q. And how long were you in Juneau before you went to Seattle?

A. About—the family was there about six or seven weeks, until November 22—from mid-September.

Q. Why did you not make a written demand upon Mr. Griffin for reimbursement for money you

(Testimony of Arthur Oszman.)

claimed they owed you while you were on the trip to Minneapolis?

A. Those things are normally taken up with your immediate superior and my immediate superior was the Traffic Manager, B. B. Edwards. Those matters were discussed at staff meeting, I believe, on a weekly basis in the Anchorage headquarters.

Q. Why did you not make a written demand on Mr. Griffin during the period you were District Manager of the Seattle office and prior to March 13 of 1947?

A. For the same reasons that I assumed the information was on file in the Treasury Department and to verbally contact my superior, who as B. B. Edwards, also went as far as bringing it to the attention of Mr. Hoppin on two or three occasions, and he suggested that I again submit my claims in entirety but that I should not be too impatient as he had been for years an employee of the government and that he was required to finish his trips and was never reimbursed for periods of five to seven or nine months following those trips, and he said he was going to use the same procedure on me.

Mr. Nesbett: No further questions, your Honor.

The Court: Is there any further cross-examination?

Mr. Kay: Just a couple of questions, your Honor.

Recross-Examination

By Mr. Kay:

Q. I believe you stated Mr. Bartoo was an officer of the company?

A. Yes, sir.

(Testimony of Arthur Oszman.)

Q. And did you ask him verbally for reimbursement, is that correct?

A. Of my account which was in arrears, yes.

Q. Is Mr. Bartoo still employed by Alaska Airlines? A. I don't believe so.

Q. And then I believe you said you brought it up verbally again with Mr. Hoppin? A. Yes, sir.

Q. Is Mr. Hoppin still employed by the company? A. No, sir.

Q. And I believe we covered Mr. Edwards. Mr. Edwards is no longer employed by Alaska Airlines? A. I don't believe so.

Q. But no written or oral demand was made by you upon Mr. Griffin, as I understand it, until March, 1947? A. That is true.

Mr. Kay: That is all.

The Court: Have the jurors any questions? That is all, sir. Another witness may be called.

Mr. Nesbett: We rest, your Honor.

The Court: The plaintiff rests. Defendant may call a witness.

Mr. Kay: Your Honor, at this time I would like to be heard upon a motion outside of the hearing of the jury.

The Court: The jury may retire to the jury room.

(The jury retired.)

The Court: Counsel may proceed.

Mr. Kay: Your Honor, at this time I would like again to urge that the complaint in this matter be

dismissed on the grounds stated in our previous demurrer. I don't care to argue it.

The Court: The motion is denied and the jury may be recalled.

Mr. Kay: I would like to make one further motion.

The Court: Pardon me.

Mr. Kay: One further motion would be that the case be dismissed on the grounds that the plaintiff has not made a case—a *prima facie* case.

The Court: The motion will be denied and exceptions will be noted in each [123] instance; and the jury may be recalled.

(The jury was recalled.)

The Court: Without objection the record will show all members of the jury present. The defendant may call a witness.

JOSEPH E. GRIFFIN

being first duly sworn, testified for and in behalf of the defendant as follows:

Direct Examination

By Mr. Kay:

Q. Mr. Griffin, will you state your name, please?

A. Joseph E. Griffin.

Q. Mr. Griffin, will you speak up now, so all the jurymen and myself can hear you? Mr. Griffin, where do you live?

A. Anchorage, Alaska; 818 K Street.

Q. How long have you been in Alaska, Mr. Griffin?

A. About two years and four months.

(Testimony of Joseph E. Griffin.)

Q. Are you employed at the present time, Mr. Griffin? A. Yes, I am, by Alaska Airlines.

Q. And how long have you been employed by Alaska Airlines? A. Since February 4, 1946.

Q. February 4, 1946? And what is your capacity with Alaska Airlines, Mr. Griffin?

A. I am Treasurer of Alaska Airlines.

Q. Have you been in that capacity—or what has been your capacity since the date of your employment?

A. I was hired as Comptroller of the company and then in December of '46 I was elected Treasurer of the company.

Q. Do you have any profession?

A. Yes, I am a certified public accountant.

Q. Well, now, Mr. Griffin, when you were employed as Treasurer of the company will you state to the jury, please, what you did to familiarize yourself with the duties of your job? [124]

A. I stopped at the Chicago office of Price Waterhouse and Company, who had just conducted an audit of Alaska Airlines for the three years and nine months period ending July 1, 1945, and I reviewed in that Chicago office, after my discharge from the Army and on my way up here, the record they had compiled in making that three years and nine months audit for the purpose of the Security and Exchange Commission in Philadelphia.

Q. What else did you do, if anything?

A. When I arrived at Alaska Airlines I went into some detail on conducting my own audit into the

(Testimony of Joseph E. Griffin.)

books and records of Alaska Airlines to familiarize myself with their business.

The Court: Speak a little more slowly and a bit louder, Mr. Griffin.

Mr. Kay: The acoustics in here are a bit poor, Mr. Griffin.

The Court: If you speak slowly we will be able to understand you more clearly.

The Witness: Yes, sir.

Mr. Kay: Now, Mr. Griffin, in the course of that examination of the books and records of the company did you familiarize yourself with the matter of policy on various matters? A. Yes, I did, sir.

Q. Mr. Griffin, will you state what the policy of the Alaska Airlines is at the present time with regard to payment of transportation for new employees of the company?

A. When a new employee is hired some place on the outside for the specific purpose of coming to Alaska to work for Alaska Airlines, he puts in an expense account upon his arrival in Anchorage or one of our other branches in Alaska, and forwards them to the Treasury Department. This must be accompanied by receipts for his transportation, and this applies to transportation costs for himself only. That expense account is then filed in the personnel file of the employee in question. At the end of six months time one-half of those expenses are refunded to the employee, and at the end of one year's continual employment the balance of the expense account is refunded to the employee. [125]

(Testimony of Joseph E. Griffin.)

Q. Now, Mr. Griffin, when, if you know, was that policy placed in effect at Alaska Airlines?

A. It was placed into effect about the spring of 1945 when T. H. Law became president.

Q. Do you know of your own knowledge whether that policy was in effect prior to that time?

Mr. Nesbett: I object, your Honor; the witness is incompetent to answer.

The Court: Objection is sustained.

Mr. Kay: Mr. Griffin, I believe that you testified that you had examined audit of affairs of Alaska Airlines made by Price Waterhouse Company?

A. That is correct.

Q. That thereafter you carefully examined the books and records here in the Territory?

A. That is correct.

Q. Now, will you state whether or not—at approximately what time was that examination made, Mr. Griffin?

A. During the months of February and March, 1946.

Q. Now, Mr. Griffin, will you state what, if anything, you found in the Price Waterhouse audit, or in the books and records of the Alaska Airlines, concerning any account owing from Alaska Airlines to Mr. Arthur Oszman?

A. There was no account payable set up on the books for Mr. Art Oszman at that time.

Q. Was any liability shown on the audit, Mr. Oszman?

A. There was no liability whatsoever on the audit.

(Testimony of Joseph E. Griffin.)

Q. Was there any item of any kind on the books and records of the company?

A. Yes, there was. There was a recap of the petty cash fund at Juneau indicating the fund was \$26.00 short, which we wrote off to expense.

Q. That single item anything to indicate Alaska Airlines owed Mr. Oszman anything?

A. There was nothing in the records to indicate any obligation.

Q. All right. Now, Mr. Griffin, were you Comptroller and/or Treasurer [126] of the company in September of 1946?

A. I was comptroller.

Q. Comptroller? Were you familiar with the fact that Mr. Art Oszman was employed by Alaska Airlines at that time?

A. Yes, I was.

Q. And did you have any discussion with Mr. Oszman at that time or not, Mr. Griffin?

A. No, not at that time. I met Mr. Oszman before he went on the plane to go to Juneau for a proving flight, but that was the extent of my talking to him.

Q. Just met him?

A. That is right.

Q. Will you state, please, what if anything was said by you and by Mr. Oszman on the occasion of that meeting?

A. There was nothing said. It was strictly a casual meeting.

Q. Just shook hands?

A. That is right.

Q. Now, Mr. Griffin, you have heard the testimony of Mr. Oszman concerning a bill for \$181.80, Gastineau Hotel. Will you state what if anything you know concerning that?

A. Yes, I will. In December, 1945, I went from

(Testimony of Joseph E. Griffin.)

here to New York via Seattle, and while in Seattle I was in the office of Alaska Airlines and spoke with Mr. Oszman, and later on that day we went to the Washington Athletic Club, and I told him that he had been advanced in cash by Mr. Brockus of our Seattle office \$150 which was an advance on an expense account to be submitted. I told him, furthermore, that he had submitted his expense accounts and had reimbursed himself out of petty cash, or caused himself to be reimbursed out of petty cash, without the prior approval of his department head or without following company procedures in which all expense accounts are made in the Anchorage office—centralized—and I said unless that \$150 was accounted for, and I didn't see how it could, since his expense accounts had covered all periods of time in question [127] since he had been reemployed, that I was, therefore, going to make a payroll deduction of \$150 when I returned from New York, and that I did. To the best of my knowledge that \$150 was never accounted for and it was shortly after that conversation that I received the hotel bill—not a bill, an expense account—stating that there was an amount of approximately \$181 paid to the Gastineau Hotel, which I imagined was to be applied against the \$150 advance. That was in January, 1947, and since we had already paid all of Mr. Oszman's expenses from September, '46, to that time I saw no justification for this hotel bill except as company policy dictates that on transfer to a new base——

Mr. Nesbett: I object, your Honor, to any further statement.

(Testimony of Joseph E. Griffin.)

The Court: Objection is sustained on company policy.

Mr. Kay: Do you know, Mr. Griffin, the circumstances surrounding Mr. Oszman's reemployment by Alaska Airlines? A. Yes, I do.

Q. Where, if you know, was Mr. Oszman to be based at that time?

A. In Juneau as District Traffic Manager.

Q. Will you state whether or not as District Traffic Manager based in Juneau he would be entitled to his hotel expenses?

A. Not after the first ten days of residence in Juneau, and strictly for himself only.

Q. Now, Mr. Griffin, you heard Mr. Oszman testify concerning the expense accounts during the months of October, November, December, I believe, 1946. Where was Mr. Oszman stationed at that time, Mr. Griffin, if you know?

A. Mr. Oszman was stationed in Juneau and was instructed by Mr. Edwards to proceed to the Minneapolis area to make a survey at which time he returned to Juneau and then was transferred to Seattle as District Traffic Manager, I think around the end of November or the beginning of December, 1946.

Q. Now, so far as you know, Mr. Griffin, were Mr. Oszman's expense accounts paid during November or December?

A. They were paid by himself out of petty cash.

Q. Will you explain what you mean by that, Mr. Griffin?

A. That when the regular petty cash come in from the station I would find attached to it an ex-

(Testimony of Joseph E. Griffin.)

pense account, also listed as a disbursement, expenses of A. J. Oszman for the period, and he reimbursed himself very promptly for his expense accounts as he put them in, and we instructed him he was to send his expense accounts to Anchorage for approval and Anchorage would issue a check for them, but this was not done until the end of January, 1947.

Q. You say at the end of January in 1947 there was a change in that situation?

A. There was.

Q. Will you state what that change was?

A. Yes. I made Mr. J. L. Brockus personally responsible for petty cash in Seattle. I informed him that if any more expense accounts were paid out of the petty cash box I personally would fire him.

Q. Now, Mr. Griffin, expense accounts submitted by Mr. Oszman for, I believe, March and February. I am going to show you Plaintiff's Exhibits 15 and 16, Mr. Griffin, and ask you whether or not you received expense accounts in substantially that amount from Mr. Oszman? A. Yes, we did.

Q. Now, were those expense accounts paid, Mr. Griffin? A. No, they weren't.

Q. Mr. Griffin, will you state, please, to the jury what the situation was in regard to those expense accounts?

A. Yes. In the—first of all, I could not secure approval from Mr. Oszman's superior since he said they were out of line, and in the second place I knew at that time that Mr. Oszman was being let go so I withheld payment until such time as we could straighten out his whole account.

(Testimony of Joseph E. Griffin.)

Q. Now, Mr. Griffin, will you please state whether or not you feel that any of those two statements should be paid by—— A. Yes——

Mr. Nesbett: I object to what Mr. Griffin feels.

The Court: Objection is sustained.

Mr. Kay: Will you state whether or not you would approve, as the Comptroller of the Alaska Airlines, a part of those expense accounts?

A. Yes, I would.

Mr. Nesbett: Object again, your Honor—

The Court: Objection is overruled. You may answer.

The Witness: Yes, I would pay them because part of them are apparently legitimate expenses and we would pay it.

Mr. Kay: Now, Mr. Griffin, will you state to the jury, please, when Mr. Oszman was terminated with Alaska Airlines?

A. Mr. Oszman was notified of his termination verbally around the end of February or the beginning of March, 1947, and this was then put in writing on March 8, 1947, and on March 11 I wrote to the Territory of Juneau with a form usually used when an employee terminates advising them of the fact that he had terminated his employeeship.

The Court: I did not understand you. Even the reporter did not understand.

The Witness: At the end of February or the beginning of March, Mr. Oszman was notified verbally that he would be terminated from the employ of Alaska Airlines and that he would be given several weeks' notice, and was informed in writing on March

(Testimony of Joseph E. Griffin.)

8, 1947, by Mr. W. R. Lynn, and on March 11, 1947, I sent the usual form to Juneau which is required when an employee becomes terminated.

Mr. Kay: Now, Mr. Griffin, will you state whether or not you thereafter received anything from Mr. Oszman?

A. Yes, I did. I received two memos, each dated March 13, 1947, in which he claimed his transportation from Minneapolis to Fairbanks in 1944, in which he claimed a very large amount as reimbursement at Juneau in the years 1944 and 1945, in which he claimed reimbursement for the transportation of his wife from Anchorage to Seattle in September, 1946—and that's about it.

Q. Now, prior to that time, Mr. Griffin, will you state whether or not you had had—between the time of Mr. Oszman's employment in September of '46 and [130] his termination in March, did you have any occasion to see or meet Mr. Oszman?

A. In Seattle that time I passed through on my way to New York I was with him for several hours.

Q. Will you state what the circumstances of that meeting were, Mr. Griffin?

A. Yes, I just dropped in—I was waiting for an airplane—to see how things were going. We repaired to the Washington Athletic Club and had a couple of drinks there, and at that time Mr. Oszman brought up to me the point that he was due for his salary increase, which we had apparently muffed, and I told him he would get his retroactive increase as soon as we could possibly do it; and I think on the next payroll he got a retroactive increase in pay.

(Testimony of Joseph E. Griffin.)

Q. Was anything said during that meeting, Mr. Griffin, concerning any of the claims on this suit?

A. No, there was not.

Q. Now, had you received any notice—any information of any kind concerning any claim of Mr. Oszman prior to the letters of March 13?

A. No, I did not.

Mr. Kay: I believe that is all.

The Court: Court will stand in recess until 3:16.

(Whereupon recess was had at 3:11 o'clock p.m.)

After Recess

The Court: Without objection the record will show all members of the jury present.

Counsel may proceed with examination.

Mr. Kay: I just have two more questions, your Honor, I would like to ask. Mr. Griffin, do you know Frank Pollack?

A. Yes, I do.

Q. Do you know, will you state if you know, where Mr. Pollack is at the present time?

A. He is in Seattle.

Q. Mr. Griffin, do you know Mr. L. V. Castner?

A. Yes, I do.

Q. Do you know where Mr. Castner is at the present time?

A. Unless he has come in today he is in Seattle.

The Court: Counsel for the plaintiff may examine.

(Testimony of Joseph E. Griffin.)

Cross-Examination

By Mr. Nesbett:

Q. Mr. Griffin, you are a certified public accountant, I believe? A. Yes, sir.

Q. And did you have occasion to examine and change the Alaska Airlines books after you arrived in Seattle and took over your duties——

A. After I arrived in Seattle?

Q. Pardon me, Anchorage—and took over your duties? A. Yes, I did.

Q. How did you find the books, generally, good condition? A. No, they were not.

Q. Were they in terrible condition?

A. They had been, but they had been brought up to date as a result of the audit by Price Waterhouse Company.

Q. What period did that cover?

A. Three years, nine months, ending July 31, 1945.

Q. After the audit in 1945, from that time onward, the books were in good shape, is that your testimony?

A. We know what goes through them.

The Court: What is the answer, sir?

The Witness: We know what goes through them.

Mr. Nesbett: Who is your immediate superior, Mr. Griffin, as treasurer of the company?

A. Mr. Wooten, president of the company.

Q. And during the time Mr. Ben Edwards was General Traffic Manager did you have any authority over Mr. Edwards? [132] A. Yes, sir.

Q. What did that authority consist of?

(Testimony of Joseph E. Griffin.)

A. All matters relating to funds of the company.

Q. And did Mr. Edwards take orders from you when it came to funds?

A. He had to have all expense accounts by himself and his department approved before payment.

Q. Approved by you?

A. By Mr. Hoppin and myself.

Q. And did you have occasion as Treasurer to disapprove any of Mr. Edwards' accounts?

A. Not very many—a couple of miscellaneous items.

Q. And if the account was disapproved by you did that eliminate any chance of payment of the account through company funds?

A. It took quite a struggle.

Q. Well, as a matter of fact, isn't it almost impossible to get the money if you disapprove the payment?

A. No, it is not impossible. I can be overruled by the President.

Q. Who was President when you came here to assume your duties, Mr. Griffin?

A. Marshall Hoppin.

Q. He could have overruled you?

A. Yes, sir.

Q. No one else would have overruled you on a decision of that nature?

A. Mr. Marshall, the Chairman of the Board, could overrule me.

Q. Mr. Marshall stayed in New York a good bit, did he not?

A. That's right.

(Testimony of Joseph E. Griffin.)

Q. Did you ever have occasion to refuse payment of any accounts to Mr. Lynn?

A. Only once that I remember, and that was in regard to car mileage.

Q. Did the President overrule him? Overrule your decision? A. No, he didn't.

Q. Did the President overrule your decision with respect to Mr. Edwards? A. No. [133]

Q. In any of the situations have you ever been overruled by the President? A. Yes.

Q. Have you? Mr. Hoppin? A. Yes.

Q. His accounts?

A. I never questioned his accounts.

Q. When was Mr. Hoppin terminated, Mr. Griffin, do you know?

A. He ceased to be President of the company on June 30, 1947, when Mr. Wooten became President.

Q. And do you know when Mr. Edwards was terminated?

A. In December, 1946, around 15 December, 1946.

Q. When was Mr. Lynn terminated?

A. It was a couple of months before Mr. Hoppin. I'd say around April, 1947.

Q. Mr. Griffin, when you received these memoranda that you testified to, dated around March 13, from Mr. Oszman, demanding reimbursement for the Gastineau Hotel bill and his transportation to Fairbanks from Minneapolis—

A. The Gastineau Hotel was not included in the March 13th—I got it prior to that.

Q. You got it prior to March 13? A. Yes.

Q. Well, when you received Mr. Oszman's de-

(Testimony of Joseph E. Griffin.)

mand for reimbursement on all those sums did you disapprove? A. Immediately.

Q. And did you notify Mr. Oszman?

A. Yes, I did.

Q. And did you first approach the President on the matter to see if he would approve them?

A. They were shown to the President of the company at that time, yes.

Q. Who was President then?

A. Mr. Hoppin.

Q. And you disapproved, is that correct? [134]

A. Yes.

Q. And notified Mr. Oszman? A. Yes.

Q. And the only way that the money could have ever been obtained by Mr. Oszman would be to go direct to Mr. Hoppin and get him to override your decision, is that correct? A. Yes, sir.

Q. And that has only happened on one or two occasions, is that correct?

A. Relative to expense accounts, why, yes, I have only been overruled on a couple of occasions.

Q. As a matter of fact, when they brought you out here, a certified public accountant, wide experience, and after making an examination of the company audit, didn't they say on this matter of expense accounts, "we want to be tough; we are going to give you a lot of authority; what you say goes"?

A. No, sir, that is not correct.

Q. You were given a lot of authority, were you not?

A. Not until Mr. Wooten became President.

Q. But you had the authority to disapprove even

(Testimony of Joseph E. Griffin.)

the General Traffic Manager's decision in respect to funds before Mr. Wooten became President?

A. That is a normal function of the Treasury Department.

Q. You could overrule any of the officers except the President? A. That is correct.

Q. In the normal function of an airline operating like Alaska did up here, would you say that's a normal function of the Treasurer?

A. Are you speaking of our airline or all airlines?

Q. You said it is a normal function of any similar organization?

A. Of any Treasury Department it is a normal function to audit expense accounts and keep them as low as possible.

Q. And disapprove of anything except those items allowed by the President?

A. Anything that is unreasonable. [135]

Q. That would leave a man in Mr. Oszman's position one of two choices: to sue for it or go to the President with his hat in his hand, would it not?

A. That is correct.

Q. Well, what is the correct procedure for Mr. Oszman to have followed?

A. To put in his expense accounts, have them approved—and we allow traffic men a bit of latitude depending upon the results they achieve.

Q. But you disapproved all his requests for reimbursement, did you not?

A. No, I did not. He was paid during the course—

(Testimony of Joseph E. Griffin.)

Q. Just a minute: To save a lot of time, I mean the accounts that are in question here.

A. Are you speaking of the amounts due back in 1944 and the amounts due in June on in 1945?

Q. Amounts—— A. Specifically?

Q. The amounts we claim are due and are suing for here at the present time.

A. If we can examine them one by one I can say what we approve and what we disapprove.

Q. Did you ever tell Mr. Oszman you should go over them one by one and find out what the company was liable for in your opinion?

A. No, I didn't.

Q. As Treasurer, wouldn't you ordinarily offer to do that in order to get a preliminary estimate?

A. Not when I am sued so fast I didn't even see the man.

Q. Well, when you denied his request for reimbursement didn't you tell him it company would be glad to compromise?

A. The company will never be glad to compromise a matter of several years' back on which no details or support has ever been given. It will be glad to compromise what it knows about and what it feels itself liable for.

Q. Well, is it your testimony that Mr. Oszman did not turn in detailed sheets for the recap of monthly expenses that is in evidence? [136]

A. I don't think I am qualified to state whether he turned them in or not. I know that we don't have them, and I know that the passenger receipts for transportation in 1944 were not submitted to me

(Testimony of Joseph E. Griffin.)

until 1947, so I don't see how the original passenger receipts could have been submitted properly at that time.

Q. Did you have occasion to ask Mr. Edwards if he had seen those detailed sheets?

A. No, I didn't. There was never any conversation with me about any of Oszman's expense accounts prior to the time of his rehiring. I knew nothing of any claims.

Q. Did you ask Mr. Edwards if those detailed sheets existed?

A. I couldn't ask him if he knew they were in existence. I didn't know they were in existence and I didn't know there was any claim.

Q. You didn't offer to get together with Mr. Oszman and iron the matter out?

A. I have nothing to get together on. What period are you talking about getting together with him?

Q. On any of these claims we claim are due.

A. He was at that time terminated and had sued the company. I am not going to get together with a man who sues the company on five minutes' notice when he is terminated.

Q. Mr. Griffin, when did you give Mr. Oszman his last pay check, do you recall?

A. I don't know when I gave him the last pay check. I know he was paid through March 24, 1947, plus vacation pay accrued.

Q. Isn't it a fact that his last pay check was held up for a period of over three months?

A. I can't state. I don't think it was held up

(Testimony of Joseph E. Griffin.)

for three months. I know it was held up slightly—what period of time I don't remember.

Q. Well now, to refresh your memory, isn't it a fact that the pay check was [137] held up for three months and that Mr. Oszman threatened suit as a result of failure to receive his last pay check?

A. I knew nothing about whether he threatened to sue for his last pay check.

Q. You knew it was held up?

A. Yes, there was some delay upon his termination. I have a letter here from the Department of Labor dated March 28. It says: "Your attention is called to our telephone conversation of March 25 regarding the non-payment of wages to Art Oszman for services terminating as of February 24." Well, that February 24 was in error. It was supposed to be March 24, but on March 28 we had a statement from the Department of Labor and Industry, so apparently he didn't waste much time going down and complaining about it.

Mr. Nesbett: No further questions, your Honor.

The Court: Any further direct examination?

Mr. Kay: I believe not, your Honor.

The Court: Have the jurors any question? That is all, Mr. Griffin. Another witness may be called.

Mr. Kay: No further witnesses, your Honor. Defense rests.

The Court: Is there any rebuttal testimony?

Mr. Nesbett: Yes, your Honor, but I would like about five minutes to talk with Mr. Oszman.

The Court: Well, we will take a little longer re-

cess and then perhaps we can go through and finish up the case. Court will stand in recess until 3:40.

(Whereupon recess was had at 3:32 o'clock p.m.)

After Recess

The Court: Plaintiff may call a witness in rebuttal.

Mr. Nesbett: Mr. Oszman again, please.

The Court: Mr. Oszman may resume the stand.

ARTHUR OSZMAN

heretofore duly sworn, resumed the stand and further testified in his own behalf as follows: [138]

Direct Examination

By Mr. Nesbett:

Q. Mr. Oszman, will you state in greater detail to the Court and jury where and when you delivered those detailed expenses set out in the recap sheets?

A. To the main office of the Treasury Department at Merrill Field—the Treasurer's office. Mr. Hedman at that time was treasurer.

Q. Alaska Airlines?

A. That is true.

Q. When did that occur?

A. In the period between May 15 and June 20.

Q. Was anyone present with you at the time you delivered those detailed sheets?

A. Yes, Mr. T. N. Law, the President of the company. We had just previous to that discussed

(Testimony of Arthur Oszman.)

them in his office. He acknowledged the obligations.

Q. Were any instructions given to Mr. Hedman by Mr. Law at that time?

A. They were. He asked Mr. Hedman to give it his immediate attention as they were in his opinion long overdue and would appreciate having mine balanced out.

Q. Now, were those the last detailed sheets you had—were those your copies? A. They were.

Q. Were those detailed sheets, I will ask you, similar in nature to the two detailed sheets you submitted for February and March in Seattle?

A. Yes, very much in detail, itemized each expenditure separately on the days which they occurred.

Q. Now, Mr. Oszman, after you had received notice of your termination in March of 1947, why did you write those memos to Mr. Griffin requesting reimbursement on these old accounts?

A. Because on the termination day, March 24, my payroll check had not arrived, and Mr. Hoppin was in the office—he couldn't understand the delay as it was so written that it would be on that date, along with the final check. [139] I believe he wired or had attempted to long distance, or place a long distance call to the Treasury Department, to Mr. Griffin, to get an answer or a reason for a delay. And in the meantime, I had again approached him the expenses covering the '44-'45 period, and he admitted that it was a deplorable condition and sug-

(Testimony of Arthur Oszman.)

gested that I should submit them again at my earliest convenience and that he, after understanding it as well as he did, would go over it with Mr. Griffin upon his return to Anchorage.

Mr. Nesbett: No further questions, your Honor.

The Court: Counsel for the defendant may examine.

Cross-Examination

By Mr. Kay:

Q. Mr. Oszman, you say you delivered these sheets to Mr. Hedman at Merrill Field?

A. Yes.

Q. About when was that, Mr. Oszman?

A. I believe it was between May 15 and June 20 of 1945.

Q. Between May and June of 1945? 1945?

A. I am quite sure, yes.

Q. '45? A. '45.

Q. Well, that would be before some of that had been done, wouldn't it, Mr. Oszman? I am sorry, I am not sure of the dates on the recap sheet.

The Court: Counsel may take the exhibits.

(Mr. Kay took exhibits from the Clerk.)

Mr. Kay: Well, that was before—just prior to your first termination with the company, is that correct?

A. As I said, I had been offered it on a permanent basis but had made previous commitments in Juneau in the other field of endeavor in Kodiak. Therefore, I was limited on my stay in Anchorage. But the President of the company, Ted

(Testimony of Arthur Oszman.)

Law, pleaded with me to continue on as long as I possibly could until he could [140] get a replacement from the States, and in that course of time I had gone over and submitted those reports to his Treasurer.

Q. And you submitted those sometime prior, then, to June 30, '45, when you terminated?

A. Yes, I say, it was prior to June 20.

Q. Now, Mr. Nesbett asked you why you wrote those memos to Mr. Griffin on March 13, and I wasn't clear about your testimony. It seemed to be something about Mr. Hoppin—a conversation with Mr. Hoppin at the time of your termination on March 24.

A. Mr. Hoppin was in Seattle as late as, I believe, as March 6, and at that time—between the fourth and sixth of March—those had been discussed again because I was not successful with any previous department head in the Treasury Department, and my only recourse was the President of the company.

Q. So you discussed those again with Mr. Hoppin?

A. Yes, sir.

Q. About March 6?

A. Yes, sir.

Q. 1947?

A. Yes, sir.

Q. Do you know where Mr. Hoppin is now, Mr. Oszman?

A. I believe he is in Anchorage.

Q. You believe he is in town?

A. He had been three or four days ago.

Mr. Kay: That is all.

(Testimony of Arthur Oszman.)

The Court: Has counsel any further examination?

Mr. Nesbett: I have.

Redirect Examination

By Mr. Nesbett:

Q. After your termination, Mr. Oszman, in Seattle, where did you go?

A. I returned immediately to Anchorage, Alaska. [141]

Q. Mr. Oszman, did you have occasion to request Mr. Griffin to go over your accounts with you and try to work something out after your termination?

A. Yes, because I had been employed by Anchorage Cold Storage as a salesman and had an opportunity to go out to Alaska Airlines to contact Mr. Griffin directly on accounts due Anchorage Cold Storage and, therefore, I served a double purpose by attempting collection on mine as well and was not successful.

Q. What did Mr. Griffin say to you on those occasions when you requested him to go over them?

A. I was seldom received in his office. He always passed word through his secretary he was much too busy and I should come back later.

Q. Did he make any statements about the earlier accounts?

A. No, he was much too busy at the time to go into anything of that nature.

Mr. Nesbett: No further questions.

The Court: That is all. Is there any further rebuttal testimony?

Mr. Nesbett: No, your Honor.

The Court: Any surrebuttal?

Mr. Kay: No, your Honor.

The Court: The next order of business is to instruct the jury upon the law. Ladies and Gentlemen of the Jury (reading):

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate [142] responsibility in the trial of the case rests upon you, because you are the triers of the facts.

[1]

Arthur J. Oszman, the plaintiff in this action, has sued the defendant, Alaska Airlines, an Alaska Corporation, claiming that the defendant is indebted to the plaintiff in the sum of \$1,840.53, by reason of expenditures made by the plaintiff for and on behalf of the defendant while the plaintiff was in performance of his duties as an employee of the defendant as stated in the plaintiff's complaint; that no part of said sum has been paid by defendant to plaintiff and that there is now due and owing from defendant to plaintiff the said sum of \$1,840.53, together with interest at the rate of six per cent per annum as claimed in said complaint.

The defendant in his answer to the plaintiff's complaint has admitted that it is a corporation organized and existing under the laws of the Territory of Alaska, and has denied all of the other allegations set out in the plaintiff's complaint.

When you retire to consider of your verdict you will take with you to the jury room the plaintiff's complaint in this action and the defendant's answer thereto, and you should there read and consider said pleadings in order to be fully informed as to the nature of the respective claims of the plaintiff and defendant.

[2]

In this case, as in all civil cases, the burden is upon the plaintiff to prove his case by a preponderance of the evidence only, and not, as in criminal cases, beyond reasonable doubt. Preponderance of evidence means the greater weight of evidence. If

the evidence in your mind is equally balanced as between the plaintiff and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiff to present evidence of greater weight than that in favor of the defendant before plaintiff is entitled to recover.

[4]

The plaintiff's claim against the defendant in this action is based upon [143] what plaintiff asserts to be contracts made by him with the defendant. A contract is an agreement between two or more persons, upon sufficient consideration, to do or not to do a particular thing. In other words, to make a contract there must be an offer by one party, for a sufficient consideration, to do or not to do a particular thing, and there must be an acceptance by the other party of that offer, and this offer and acceptance must be equally binding upon both parties to the agreement. A contract may embrace more than one subject. In order to determine whether a contract or contracts were made by and between the parties to this action, you should consider all of the negotiations, conversations and dealings between the parties with respect to the subject matter of the action. It is not necessary that a contract or contracts such as are claimed to have existed in this action should be in writing, for such contracts, if they existed, may be orally as well as in writing.

[4-A]

A contract is a promise, or a set of promises, between persons for the breach of which the law gives

a remedy, or the performance of which the law recognizes as a duty. A promise in a contract must be stated in such words, either oral or written, or may be inferred wholly or partly from such conduct, as justifies one person in understanding that the other person intended to make a promise. Thus, in the present case, upon any item of his claim, the plaintiff to recover must establish by a preponderance of the evidence, as to such item, that the defendant by one or more of its duly authorized officers, agents or representatives, promised payment or reimbursements to plaintiff, either orally or in writing, or plaintiff must prove such conduct on behalf of the defendant as would justify plaintiff in understanding that reimbursement or payment was so promised. In legal view, the defendant although a corporation is a "person." A corporation must act through its officers, agents or representatives authorized so to act. [144]

[5]

If you find from a preponderance of the evidence that the material averments of plaintiff's complaint are true as to all or any of the various sums claimed by plaintiff, then your verdict should be for the plaintiff and against the defendant for such sums as you find the plaintiff justly entitled to recover from the defendant in this action, not to exceed, however, the sum of \$1,840.53, together with interest thereon as claimed in the complaint.

But if the plaintiff has failed to prove his case for any amount by a fair preponderance of the evidence, then your verdict should be for the defendant and against the plaintiff.

[5-A]

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

[6]

The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules

of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

[7]

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of juror, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and [146] under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

[8]

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

[9]

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

[10]

Upon retiring to the jury room you will elect one of your members foreman of the jury who will speak for you and sign the verdict unanimously agreed upon. You will take with you to the jury room these instructions, the pleadings in the [147] case, the exhibits, and two forms of verdict which have been prepared for your use.

If you find for the plaintiff and against the defendant your foreman will insert in the verdict which has been prepared for that contingency the amount which you have determine the plaintiff is justly entitled to receive, but not to exceed the sum of \$1,840.53, together with interest thereon at the rate of 6% per annum as claimed in the plain-

tiff's complaint. Your foreman will thereupon date and sign the verdict and return the same into court as your verdict.

The form of verdict not used will be destroyed by your foreman.

You will return into court with your verdict these instructions, the pleadings and the exhibits.

Dated at Anchorage, Alaska, this 28th day of May, 1948.

And I have signed as District Judge.

Counsel for both parties may now come to the bench with the court reporter and take exceptions to the instructions given and the refusal to give requested instructions.

(The following then occurred in the presence of the jury but not in hearing of the jury:)

The Court: Plaintiff's counsel may take exceptions first.

Mr. Nesbett: I have no exceptions to take to any instructions, your Honor.

The Court: Defendant's counsel?

Mr. Kay: I have no exception to any of the instructions but I would like to except to failure of the Court to give Defendant's Proposed Instructions 2, 3 and 5.

The Court: Very well. All of the proposed instructions as to the defendant will be filed in the case and as to Instructions 2, 3 and 5, the notation will be made that they are refused except as covered by instructions given and an exception is noted.

Mr. Kay: Thank you, sir.

The Court: And if counsel desire it upon appeal they may be entered in the [148] record of the court reporter at this point.

* * * *

DEFENDANT'S REQUESTED INSTRUCTIONS TO THE JURY

The Defendant respectfully requests this Honorable Court to give the following instructions in the above-entitled matter:

First Proposed Instructions

1. A Contract is a promise, or a set of promises, between parties for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty. A promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the one party in understanding that the other party intended to make a promise. Thus, in the present case, the plaintiff must establish by a preponderance of the evidence as to each item of his claim, that duly authorized officials of the defendant promised him reimbursement orally or in writing, or he must establish such conduct by the defendant as would justify him in understanding that reimbursement was promised.

Based on: Restatement, Contracts, Secs. 1 and 5.

Second Proposed Instructions

2. In this case there has been conflicting testimony as to whether or not the plaintiff made

prompt demands for the payment of the amounts which he claims. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he now sues, is susceptible of various explanations consistent with his theory of the justness of his claim, and it is for you to say whether or not the plaintiff has offered one that is satisfactory or not.

Randall's Instructions, Vol. 2, p. 1326.

(Refused except as covered by instructions given. Exception noted. Anthony J. Dimond, District Judge.) [149]

Third Proposed Instructions

3. In this case there is conflicting testimony on the part of the plaintiff and the defendant. The credibility of the witnesses is a matter which it is within your province to determine. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he sues, is a matter which may be considered by you in passing upon the credibility of the plaintiff.

(Refused except as covered by instructions given. Exception noted. Anthony J. Dimond, District Judge.)

Fourth Proposed Instructions

4. You are instructed that in legal contemplation a contract is "an agreement between two or more persons, upon sufficient consideration, to do or not to do a particular thing." In other words to make a contract there must be an offer, by one party, for a sufficient consideration, to do or not to do a particular thing, and there must be an acceptance, by the other party, of that offer, and this offer and acceptance must be equally binding upon both parties to the agreement, and must be to do or not to do a particular thing. In order to determine whether there was or was not a contract between the plaintiff and defendant, you should consider all the negotiations, conversations and dealings of the parties in respect to the subject matter involved in this suit.

5. The Jury are instructed that a promise would not be implied from the fact that the plaintiff, without defendant's knowledge, performed certain services or incurred certain expenses, which were useful to the defendant, but it might be implied from the conduct of the parties. If the Jury find that the plaintiff incurred these items of expense with the expectation that the defendant would pay him for them, and the defendant had reason to know that the plaintiff was so acting with that expectation and allowed him to so act without objection, and with such conduct as might lead him to believe that he would be [150] paid for them, then the

jury might infer a promise by defendant to pay the plaintiff.

(Refused except as covered by instructions given. Exception noted. Anthony J. Dimond, District Judge.)

Respectfully submitted,

/s/ WENDELL P. KAY,

Of Attorneys for Defendant.

* * * *

The Court: Counsel for the plaintiff may make opening argument to the jury. Do counsel wish their arguments reported?

Mr. Nesbett: We waive reporting.

Mr. Kay: We waive, your Honor.

The Court: Counsel waive reporting and the reporter will be excused until recalled.

(The reporter was excused at 4:53 o'clock pm. and recalled at 5:35 o'clock p.m.)

The Court: Counsel have stipulated in open court that the jury may return a sealed verdict.

(Envelope for a sealed verdict was given the jury; W. B. Healy and George W. Parks were duly sworn as bailiffs in charge of the jurors; and the jury retired to consider of its verdict.)

(At 10:00 o'clock a.m. of Saturday, May 29, 1948, the jury returned the following verdict:)

VERDICT

We, the jury, duly selected, impaneled and sworn to try the above-entitled cause, do find for the

plaintiff and against the defendant, and find that the plaintiff is entitled to recover of and from the defendant the sum of \$1,840.53, together with interest thereon at the rate of 6% per annum as claimed in the plaintiff's complaint.

Dated at Anchorage, Alaska, this 28th day of May, 1948.

/s/ M. B. AMES,
Foreman. [151]

(The verdict was ordered received and filed and entered and the jurors were discharged from service in the case.)

* * * *

United States of America,
Territory of Alaska—ss.

I, Ruth Haley, of Anchorage, Alaska, hereby certify:

That I am the official court reporter in the District Court for the Territory of Alaska, Third Division; that I attended the trial of the cause entitled Arthur J. Oszman, Plaintiff, v. Alaska Airlines, Defendant, No. A-4586, at Anchorage, Alaska, on May 27, 28 and 29, 1948, and recorded by means of machine shorthand the testimony given and proceedings had; that I thereafter transcribed said shorthand, and the foregoing pages, numbered 1 to 184, inclusive, comprise a full, true and correct statement and transcript of such testimony and proceedings, and the original and one carbon

copy have this day been delivered to Mr. Wendell Kay of Counsel for the defendant.

Dated at Anchorage, Alaska, this 9th day of November, 1948.

/s/ RUTH HALEY,

Court Reporter. [152]

During said proceedings, on May 28, 1948, and prior to the jury receiving the case for its deliberation and verdict, defendant moved that the cause be dismissed on the grounds stated in the Demurrer, and moved that the case be dismissed on grounds that the plaintiff had not proved a prima facie case, wherein the following proceedings were had:

“The Court: The plaintiff rests. Defendant may call a witness.

Mr. Kay: Your Honor, at this time I would like to be heard upon a motion outside of the hearing of the jury.

The Court: The jury may retire to the jury room.

(The jury retired.)

The Court: Counsel may proceed.

Mr. Kay: Your Honor, at this time I would like again to urge that the complaint in this matter be dismissed on the grounds stated in our previous demurrer. I don't care to argue it.

The Court: The motion is denied and the jury may be recalled.

Mr. Kay: I would like to make one further motion.

The Court: Pardon me.

Mr. Kay: On further motion would be that the case be dismissed on the grounds the plaintiff has not made a case—a *prima facie* case.

The Court: The motion will be denied and exceptions will be noted in each instance; and the jury may be recalled.”

The Minute Order denying these motions of the defendant reads as follows:

TRIAL BY JURY CONTINUED

“No. A-4586

Now came the Trial Jury who, on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of Cause No. A-4586, entitled Arthur J. Oszman, plaintiff, versus Alaska Airlines, an Alaskan Corporation, defendant, was resumed.

Arthur Oszman, heretofore, duly sworn, resumed the witness stand for further testimony for and in his own behalf.

The plaintiff rests.

At this time Wendell P. Kay, for and in behalf of the defendant, moves the Jury be excused pending argument on points of law.

At this time, Wendell P. Kay, for and in behalf of the defendant, moves the Court that cause be dismissed on grounds stated in previous demur-

rer; motion denied; and further moves that cause be dismissed on grounds that plaintiff has failed to establish a case on the face of the evidence; motion denied and trial jury recalled. [153]

Joseph E. Griffin, being first duly sworn, testified for and in his own behalf.

At 3:10 o'clock p.m. Court duly admonished the Trial Jury and continued cause of 3:16 o'clock p.m."

Thereafter, the Court read his instructions to the trial jury. Following the instructions, the following proceedings were had:

"Counsel for both parties may now come to the bench with the court reporter and take exceptions to the instructions given and the refusal to give requested instructions.

(The following then occurred in the presence of the jury but not in hearing of the jury:)

The Court: Plaintiff's counsel may take exceptions first.

Mr. Nesbett: I have no exceptions to take to any instructions, your Honor.

The Court: Defendant's counsel?

Mr. Kay: I have no exceptions to any of the instructions, but I would like to except to failure of the Court to give Defendant's Proposed Instructions 2, 3 and 5.

The Court: Very well. All of the proposed instructions as to the defendant will be filed in the case and as to Instructions 2, 3 and 5, the notation will be made that they are refused except as cov-

ered by instructions given and an exception is noted.

Mr. Kay: Thank you, sir.

The Court: And if counsel desires it upon appeal they may be entered in the record of the court reporter at this point."

The defendant's proposed Instructions 2, 3 and 5, which were refused by the Court, were as follows:

"Second Proposed Instructions

2. In this case there has been conflicting testimony as to whether or not the plaintiff made prompt demands for the payment of the amounts which he claims. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he now sues, is susceptible of various explanations consistent with his theory of the justness of his claim, and it is for you to say whether or not the plaintiff has offered one that is satisfactory or not.

Randall's Instructions, Vol. 2, p. 1326.

(Refused except as covered by instructions given. Exception noted. Anthony J. Dimond, District Judge.)

Third Proposed Instructions

3. In this case there is conflicting testimony on the part of the plaintiff and the defendant. The credibility of the witnesses [154] is a matter which it is within your province to determine. You are

instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he sues, is a matter which may be considered by you in passing upon the credibility of the plaintiff.

(Refused except as covered by instructions given. Exception noted. Anthony J. Dimond, District Judge.)”

“Fifth Proposed Instructions

5. The Jury are instructed that a promise would not be implied from the fact that the plaintiff, without defendant’s knowledge, performed certain services or incurred certain expenses, which were useful to the defendant, but it might be implied from the conduct of the parties. If the Jury find that the plaintiff incurred these items of expense with the expectation that the defendant would pay him for them, and the defendant had reason to know that the plaintiff was so acting with that expectation and allowed him to so act without objection, and with such conduct as might lead him to believe that he would be paid for them, then the jury might infer a promise by defendant to pay the plaintiff.

(Refused except as covered by instructions given. Exception noted. Anthony J. Dimond, District Judge.)”

Thereafter, defendant made its motion for a new trial, said motion reading as follows:

“MOTION FOR A NEW TRIAL

Comes now the defendant above named and moves this honorable court for an order setting aside and vacating the verdict and judgment of the jury heretofore rendered and entered in favor of the plaintiff and against the defendant in the above-entitled action, and feeling aggrieved by such verdict and judgment moves that a new trial of said action be granted to said defendant for the following causes alleged by defendant as material affecting its substantial rights and rulings of the court which were prejudicial to its substantial rights, to-wit:

Errors in law occurring at the trial and excepted to by the defendant.

1. The court erred in overruling the respective demurrers of defendant to the complaint of plaintiff on file herein.

2. The court erred in denying defendant's motion at the close of plaintiff's case to grant a nonsuit on the ground that plaintiff had failed to prove a case as laid in his complaint.

3. The court erred in failing to instruct the jury as requested by the Defendant in Defendant's proposed instructions 2, 3 and 5. [155]

Insufficiency of the evidence to justify the verdict and judgment.

Wherefore, defendant moves said court to grant a new trial in the above-entitled action.

Dated this 1st day of June, 1948.

1 /s/ WENDELL P. KAY,
- Attorneys for Defendant.”

And thereafter, the Court made and entered its order denying defendant's motion for a new trial, which order reads as follows:

“No. A-4586

HEARING ON MOTION FOR NEW TRIAL

Now at this time hearing on motion for new trial in case No. A-4586, entitled Arthur J. Oszman, plaintiff, versus Alaska Airlines, an Alaskan corporation, defendant, came on regularly before the Court, the plaintiff not being present but represented by Buell A. Nesbett, of his counsel, the defendant not being present, but represented by Wendell P. Kay, of its counsel. The following proceedings were had, to-wit:

Argument to the Court was had by Wendell P. Kay, for and in behalf of the defendant.

Whereupon the Court having heard the argument of counsel and being fully and duly advised in the premises, denied motion for new trial.”

Thereafter, on the 4th day of October, 1948, the term of the Court was extended to and including the 13th day of November, 1948, within which to present, settle and allow the bill of exceptions, and perfect the bill of appeal of the defendant in said action. Said order was signed and filed on the 4th day of October, 1948. Thereafter, said Court by its order duly given, made and filed on the 4th day of October, 1948, extending the time for filing of the record and docketing said action in the U. S. Court of Appeals to and including the 13th day of November, 1948.

Thereafter, and on November 12, 1948, the time of the defendant to file its proposed bill of exceptions in said action, and filing and docketing the case in

the U. S. Circuit Court of Appeals was, by an order of that date, extended to and including the 1st day of December, 1948.

And thereafter, and on the 1st day of December, 1948, the term of said Court for the purpose of presentation, settlement and allowance of the bill of exceptions herein was extended to and including the 31st day of December, 1948; [156] and by order made and entered on November 30, 1948, the time of the defendant to file the record and docket the case in the U. S. Circuit Court of Appeals, was extended to and including the 31st day of December, 1948.

Thereafter, by order of the Court made and entered on December 31, 1948, the terms of the Court was extended for the purpose of presentation, settlement and allowance of the bill of exceptions and to perfect the appeal of the defendant was extended to and including the 1st day of February, 1949. Thereafter on December 31, 1948, and by its order, signed and filed that day, the time for filing the record and docketing this cause in the U. S. Court of Appeals for the Ninth Circuit was extended to and including the 1st day of February, 1949. Thereafter on the 1st day of February, 1949, and by its order, signed and filed that day, the time for filing the record and docketing this cause in the U. S. Court of Appeals for the Ninth Circuit was extended to and including the 1st day of March, 1949. Thereafter on the 1st day of March, 1949, and by its order, signed and filed that day, the time for filing the record and docketing this cause in the U. S. Circuit Court of Appeals for the Ninth Circuit was extended to and including the 2nd day of April, 1949.

The said defendant, Alaska Airlines, an Alaskan corporation, tenders and presents the foregoing as its bill of exceptions in said cause and prays that the same be settled, allowed, signed and sealed. and made a part of the record in said cause by this Court pursuant to law in such cases.

Dated at Anchorage, Alaska, this 27th day of January, 1949.

/s/ WENDELL P. KAY,
Attorney for Defendant, Alaska Airlines.

[Endorsed]: Filed March 17, 1949. [157]

[Title of District Court and Cause.]

STIPULATION SETTLING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between counsel for plaintiff and defendant above-named, that the foregoing statement of the testimony introduced at the trial of the above-entitled action, together with the motions therein referred to and rulings thereon, is a true, correct and accurate statement thereof.

It is further Stipulated and Agreed, that Bill of Exceptions may be approved and settled as the Bill of Exceptions immediately and without further notice.

Dated at Anchorage, Alaska, this 14th day of Mar., 1949.

/s/ J. L. McCARREY, Jr.,
Attorneys for Plaintiff.

/s/ WENDELL P. KAY,
Attorney for Defendant.

[Endorsed]: Filed March 17, 1949. [158]

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The defendant in the above-entitled action having applied to the Court for an order approving the foregoing Bill of Exceptions in the above-entitled action, and plaintiff and defendant by and through their respective counsel having stipulated that said Bill of Exceptions is a true, correct and accurate statement of all the testimony introduced in the trial of said cause and all the motions made and the Court rulings thereon, and having stipulated that said Bill of Exceptions may be approved and settled as the Bill of Exceptions in said cause without further notice; and

It further appearing that said Bill of Exceptions contains a statement of the evidence in said cause, and is complete and correct, and said Bill of Exceptions, motions made therein and the Court's rulings thereon, is complete and correct, and said Bill of Exceptions having been heretofore presented to the Court for settlement within the time allowed by law and the rules of this Court, and the Court being fully advised in the premises, it is therefore

Ordered, that the foregoing Bill of Exceptions be, and the same hereby is approved and settled as the Bill of Exceptions in the above-entitled cause upon appeal of the defendant to the United States Court of Appeals for the Ninth Circuit; and it is

Further Ordered, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court who presided at the hearing of said cause and before whom in said cause the testimony

was given, motions made and the [159] Court's rulings thereon, and that the said Bill of Exceptions contains a full statement of all the evidence in said cause and upon which judgment therein is based.

Dated this 17th day of March, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered Journal No. G-18, Page No. 269, Mar. 17, 1949.

[Endorsed]: Filed March 17, 1949. [160]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska,
Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed pages, numbered from 1 to 161, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; and that this transcript is made in accordance with the stipulations for praecipe filed in my office on the 17th day of March, 1949; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$17.20, has been paid to me by Wendell P. Kay, counsel for the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of April, 1949.

/s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division. [161]

[Endorsed]: No. 12231. United States Court of Appeals for the Ninth Circuit. Alaska Airlines, an Alaskan corporation, Appellant, vs. Arthur J. Oszman, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed April 23, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12231

ALASKA AIRLINES, INC., an Alaskan
Corporation,

Appellant,

vs.

ARTHUR J. OSZMAN,

Appellee.

ADOPTION OF ASSIGNMENTS OF ERROR
AS POINTS ON APPEAL

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

Please be informed that the appellant in the above-entitled action hereby adopts as points on which he intends to rely, the Assignments of Error appearing in the Transcript of Record.

Appellant designates for printing the entire Transcript of Record.

/s/ WENDELL P. KAY,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed May 19, 1949. Paul P. O'Brien,
Clerk.

No. 12,231

IN THE

United States Court of Appeals
For the Ninth Circuit

ALASKA AIRLINES (an Alaska Corpora-
tion),

Appellant,

VS.

ARTHUR J. OSZMAN,

Appellee.

Appeal from the District Court for the Territory of Alaska,
Third Division.

BRIEF FOR APPELLANT.

WENDELL P. KAY,

WARREN N. CUDDY,

Anchorage, Alaska,

Attorneys for Appellant.

FILED

AUG 17 1949

PAUL P. O'BRIEN,

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No. 12,231

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALASKA AIRLINES (an Alaska Corpora-
tion),

Appellant,

vs.

ARTHUR J. OSZMAN,

Appellee.

Appeal from the District Court for the Territory of Alaska,
Third Division.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court is based upon Alaska Compiled Laws (1933), Title 3, and 48 U.S. C.A. Section 101 (Territories and Insular Possessions). This court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

STATEMENT OF THE CASE.

The pleadings.

Appellee filed his complaint on June 21, 1947. The complaint alleged that between May 1, 1944 and March 31, 1947 appellee had expended the sum of One Thousand Eight Hundred Forty and 53/100 Dollars (\$1,840.53) of his own money for the use and benefit of the appellant, while employed by appellant as District Traffic Manager; that this money was expended by appellee in reliance on appellant's verbal promise to pay for such expenditures; that appellee had repeatedly demanded payment of the sum, but appellant had not repaid the same nor any part thereof. Attached to the complaint as Exhibit "A", was a list of the expenditures making up the total demand. (T.R. 2-4.) Appellant's answer consisted of an allegation qualifying the corporation to appear and defend the suit and a general denial of all of the allegations of the appellee's complaint. (T.R. 6.)

The evidence.

The pertinent facts out of which this case arose can be briefly stated.

Appellee was employed by appellant during two periods, separated by an interval of a year and three months. (T.R. 114, 51-54, 26.) He was first employed by appellant's Operations Manager, Frank Pollock, on May 4, 1944, and was assigned to duty in Juneau, Alaska. (T.R. 26.) Appellee continued to work for appellant in Juneau and in Anchorage until June 30, 1945, when he resigned his position and went to work

for Ray Martin in Kodiak. (T.R. 107.) Ray Martin was the local agent for appellant in Kodiak until August 15, 1945; at that time appellant's certificate to Kodiak was cancelled and Martin shifted his agency to Pacific Northern Airlines. (T.R. 53, 108-9.)

Appellee continued to work for Martin in Kodiak until September 14, 1946, returning then to Anchorage and to the employ of the appellant. (T.R. 112.) After approximately 30 days in appellant's Juneau office, he was transferred to Seattle, where he was notified of his discharge on March 8, 1947. (T.R. 54, 167.) The discharge was effective on March 24, 1947.

Thereafter, appellant's treasurer, Joseph E. Griffin, received two memorandums from appellee, each dated March 13, 1947, demanding reimbursement from appellant for various items of expense and transportation in the total sum of \$1,840.53. (T.R. 4, 33-36, 168.) Some of these items dated back to the first months of his first period of employment, including an item of \$219.30 for transportation from Minneapolis to Fairbanks to accept employment with appellant in May, 1944. (T.R. 28, 168.) According to these memoranda, appellant was indebted to appellee in the sum of \$1,209.43, in June, 1945, when he went to work for Martin in Kodiak. (T.R. 113.) The balance of the total claimed covered travel expenses in Juneau, and elsewhere, and expense accounts in Seattle during the second period of employment. (T.R. 4.)

Arthur J. Oszman.

Only two witnesses testified at the trial. Appellee, testifying in his own behalf, claimed to have been promised reimbursement for the trip from Minneapolis by Pollock in April, 1944. (T.R. 27, 87.) Appellee stated that he had submitted his accounts for additional expenses regularly each month during the first period of his employment, in detail. (T.R. 36-51.) Neither the originals nor copies of these accounts were produced at the trial. (T.R. 36.) Appellee testified that he had previously submitted the originals and copies to appellant's Treasury Department; a "recap" of the amounts claimed was submitted at the trial. (T.R. 36-39.) According to appellee, these amounts represented sums which he was required to expend on company business out of his personal funds. He gave a variety of examples of such expenditures. (T.R. 40-42, 124-129.) Appellee maintained that he had written a number of notes or memos to appellant's officials between the fall of 1944 and June 30, 1945, requesting payment of the sums alleged to be due him. He stated that he kept no copies of any of these letters, and neither copies nor originals were offered in evidence. (T.R. 132-137.)

Appellee named a number of appellant's employees to whom he claimed to have addressed either oral or written demands for payment. Specifically, he named Odenwalder, Castner, Law, Hedman, Edwards, Perry, Seno, Nordman, Bartoo and Hoppin. He admitted that none of these persons were now employed by appellant. (T.R. 145-146, 157-158.)

Joseph E. Griffin was treasurer of the company when appellee was re-employed in September, 1946, and continued as such throughout the second period of appellee's employment. Appellee spent several hours with Griffin in Seattle a few days before Christmas of 1946. He admitted that he did not discuss the subject of appellant's alleged indebtedness to him with Griffin on that occasion, and that he never made any written demand on Griffin prior to March 13, 1947, after he had been notified of his discharge. (T.R. 143-145.)

Joseph E. Griffin.

Joseph E. Griffin, a certified public accountant, was hired by appellant as Comptroller on February 4, 1946; in December of the same year, he was elected Treasurer. (T.R. 160.) Upon assuming his duties, Griffin made a careful study of an audit of appellant which Price Waterhouse & Company had just completed, covering the period of 3 years and 9 months prior to July 1, 1945. During February and March, 1946, he made a careful examination of appellant's books and records. (T.R. 160-162.) Griffin testified that neither the audit nor the books and records of the company revealed any account payable, indebtedness or obligation to appellee. (T.R. 162-163.) The only item in the books and records of the company relative to appellee, "was a recap of the petty cash fund in Juneau indicating the fund was \$26.00 short, which we wrote off to expense". (T.R. 163.)

Griffin testified that he spent several hours with appellee, both in the Seattle office and the Washington Athletic Club, on one occasion in December, 1946. Although the two men discussed appellee's practice of deducting his expense account from petty cash, as well as a salary increase then due, appellee did not once mention the sums which he now claims were then owing by appellant. (T.R. 164, 168-169.) Griffin never was notified of any claim by appellee prior to the letters from appellee dated March 13, 1947, five days after he had been notified in writing of his discharge. (T.R. 167, 169.)

Verdict, judgment and appeal.

The jury found that the appellee was entitled to recover the sum of \$1,840.53 from appellant, together with interest at the rate of six percent (6%) per annum. (T.R. 196.) Judgment was entered accordingly on the 2nd day of July, 1948. (T.R. 10.) Appellant filed a motion for new trial which was denied on June 4, 1948. (T.R. 10-12.) Appellant thereupon filed his petition for allowance of appeal on August 17, 1948 (T.R. 13), and filed his assignment of errors. (T.R. 14.)

SPECIFICATION OF ERRORS.

It is not our intention to set forth or argue all of the assignments of error appearing in the transcript. (T.R. 14-15.) It is our contention that the court did err in the following particulars:

1. That the court erred in failing to instruct the jury, as requested by the appellant in the appellant's proposed instruction #2, as follows:

"2. In this case there has been conflicting testimony as to whether or not the plaintiff made prompt demands for the payment of the amounts which he claims. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he now sues, is susceptible of various explanations consistent with his theory of the justness of his claim, and it is for you to say whether or not the plaintiff has offered one that is satisfactory or not."

Because of the court's failure to give the requested instruction, the entire theory of the defense was not submitted to the jury by the court.

2. That prejudicial error was committed in failing to instruct the jury as requested by the appellant in the appellant's proposed instruction #3, as follows:

"3. In this case there is conflicting testimony on the part of the plaintiff and the defendant. The credibility of the witnesses is a matter which is within your province to determine. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he sues, is a matter which may be considered by you in passing upon the credibility of the plaintiff."

The failure to give this proposed instruction, coupled with proposed instruction #2, meant that the court failed to submit to the jury the entire theory of the defense.

ARGUMENT.

- I. IT WAS PREJUDICIAL ERROR FOR THE COURT TO REFUSE TO INSTRUCT THE JURY AS FOLLOWS: "IN THIS CASE THERE HAS BEEN CONFLICTING TESTIMONY AS TO WHETHER OR NOT THE PLAINTIFF MADE PROMPT DEMANDS FOR THE PAYMENT OF THE AMOUNTS WHICH HE CLAIMS. YOU ARE INSTRUCTED THAT THE FACT THAT THE PLAINTIFF MAY HAVE SUFFERED A LONG PERIOD OF TIME TO ELAPSE WITHOUT MAKING DEMAND OR BRINGING SUIT FOR THE ALLEGED ITEMS OF INDEBTNESS FOR WHICH HE NOW SUES, IS SUSCEPTIBLE OF VARIOUS EXPLANATIONS CONSISTENT WITH HIS THEORY OF THE JUSTNESS OF HIS CLAIM, AND IT IS FOR YOU TO SAY WHETHER OR NOT THE PLAINTIFF HAS OFFERED ONE THAT IS SATISFACTORY OR NOT."

A. The evidence offered at the trial presented a distinct conflict as to whether the appellee had ever made any demand upon the appellant for payment of the sums claimed to be due, prior to the appellee's discharge. According to the appellee, he had vigorously pressed his claims upon numerous occasions, both orally and in writing. (T.R. 99, 104, 105, 106, 111.) On the other hand, appellant's Treasurer testified that there was nothing in the audit, or books and records of the company to indicate any indebtedness to appellee, and that appellee never made any demand for payment from the time of re-employment in Sep-

tember, 1946, until after his discharge in March of 1947. (T.R. 162-164, 168.) Appellee admits that he made no written claim of any kind on appellant during this period, nor during the previous extended period of employment by Martin in Kodiak. He also admitted that he did not discuss the alleged indebtedness with Griffin, appellant's Treasurer, when they spent several hours together in Seattle shortly before Christmas of 1946. Upon this state of the evidence, the jury could either believe that appellee had "repeatedly demanded payment" as he had alleged in his complaint, or that he had never demanded any of these sums from the appellant until after his discharge. If the latter conclusion could be drawn from the facts, it would support a strong inference that appellee's entire claim was fabricated and motivated by pique at his discharge, and that in fact appellant owed him nothing.

There are a great many legal situations in which human conduct may be significant in evaluating the merits of the cause. Prior conduct of the plaintiff suggesting that his present contentions are exaggerated may be evidence of the most persuasive sort.

Carpenter v. Baltimore & Ohio R. Co. (C.C.A. 6th) 109 F. (2d) 375, 379.

Thus, the failure to present a claim with reasonable promptness, a delay in instituting a prosecution, an evident reluctance to seek redress for an alleged wrong, or the failure to sue or prosecute in the jurisdiction or court which would naturally be sought, may

be some indication of a belief in the weakness of one's cause.

"These are but a few illustrations of a great variety of the party's conduct which may be and constantly is inquired into as affecting his belief in the merits of his cause."

II Wigmore, *Evidence* Sec. 284 (3rd Ed.)

Or, as Justice Brandeis pointed out in *United States v. Tod*, "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." 263 U.S. 149, 153, 44 S. Ct. 54, 56, 68 L. Ed. 221, 224.

See also,

Moncado v. Ramsey (C.C.A. 8th), 167 F. (2d) 191.

Failure to make demand for payment of a claim for an extended period of time is obviously conduct which tends to reflect on the validity of the claim. Evidence as to delay of this type is always admissible; it may be considered as having some logical tendency to discredit the claim.

Walker v. Harvey (C.C.A. 3rd), 108 Fed. 741;

Pauling v. Pauling (C.C.A. 8th), 159 F. (2d) 531;

Page v. Hazelton, 74 N.H. 252, 66 Atl. 1049;

Webster v. Sibley, 72 Mich. 630, 40 N.W. 772;

Shaddock v. Alpine Plank-Road Co., 79 Mich. 7, 44 N.W. 158;

Hubenthal v. Gibbons, 168 Iowa 630, 150 N.W. 1067.

For example, in *Page v. Hazelton*, the defendant was permitted to prove that at a time when the plaintiff claimed the defendant, then living and solvent, was indebted to him in a large sum, the plaintiff told a witness that he was unable to pay a note which he owed. The court noted that this evidence tended to show that the plaintiff was in need of money at a time when, according to his present claim, the defendant had cash available and could have paid the claim had it been asserted. 74 N.H. 252, 66 Atl. 1049.

“The plaintiff’s failure, in this situation, to demand or attempt to collect his debt of a responsible debtor for a considerable time, and until after the death of his alleged debtor, is a circumstance which has some logical tendency to discredit his present claim. Failure to make claim when occasion therefor exists has some tendency to prove the invalidity or non-existence of the claim.”

And, in *Webster v. Sibley*, 72 Mich. 630, 40 N.W. 772, the defendants offered to prove that the plaintiff never made known that he had a claim or informed the defendants thereof until two or three years after he was entitled to the pay he claims. The court commented,

“When the omission to make demand for a claim against a debtor may be taken as a circumstance against its existence, depends upon the circumstances of each particular case. Among business men in cities, transacting large amounts of business, claims are liquidated every few days, and settlements made on short time, and the presump-

tion arises much sooner than in the country, where longer credits are usually extended; but in all cases the testimony is competent, and the question is one for the jury, and we think the testimony offered was proper in this case." 40 N.W. 772, 775.

Similarly, in *Pauling v. Pauling* (C.C.A. 8th), 159 F. (2d) 531,

"Appellant's failure for nearly 13 years after the effective date of the divorce decree to assert the rights which she now claims, and Pauling's failure to recognize these rights, is some evidence that neither she nor Pauling placed the interpretation upon the decree which she now asserts."

and further,

"And the course pursued for years by both appellant and Pauling in carrying out the terms of the divorce decree is strong evidence of the meaning which both of them placed upon it." 159 F. (2d) 531, 536, cert. den., 67 S. Ct. 1192.

Evidence of delay in asserting a claim being properly admissible, a legal theory of either party based on such evidence must be submitted to the jury by the instructions. It is prejudicial error for the trial court to refuse to give a requested instruction based on the theory of unreasonable delay, if there is evidence in the record tending to support such a theory.

Shadock v. Alpine Plank-Road Co., 79 Mich. 7, 44 N.W. 158;

Hubenthal v. Gibbons, 168 Iowa 630, 150 N.W. 1067.

Thus, in the *Shaddock* case, the plaintiff brought suit for personal injuries resulting from being thrown off his wagon by a log in the road. The suit was not begun until nearly six years after the accident; nevertheless the jury were instructed that they should draw no prejudicial inferences from the delay to sue. Because of this error, among others, the judgment was reversed and a new trial granted. Regarding the delay, the court said:

“In this connection, we also think it was error to prevent the jury from taking into account, for any purpose, the long delay in suing. No one claimed that the action was barred, if brought within six years. But courts of equity, when dealing with matters of fact not barred by lapse of time, are in the every-day habit of considering delay as one of the elements of judgment, and of requiring stronger testimony in stale cases. The whole reason for statutes of limitation is found in the danger of losing testimony, and of finding difficulty in getting at precise facts. Very few persons preserve such memoranda or other means of evidence as will enable them to show what was the condition of affairs at a remote period, which they have had no occasion to recall or remember. It would be very hard justice to prevent juries from considering what courts, as judges of fact, consider in similar circumstances. Delay is in itself a circumstance in human conduct which, while the law raises no absolute presumption from it, is nevertheless, in many cases, very significant. There is, in all controversies of this kind, some occasion for considering many questions of human conduct, and many probabilities. Testimony of

old transactions is seldom perfect, and human memory, where all witnesses survive, is more or less fallible. It has been found by legislatures always that time affects the accuracy and preservation of testimony so much that it is safer to fix a period of actual bar than to leave persons exposed to injustice from stale demands. It is not reasonable to hold that a difference of a day or a fortnight out of six years shall prevent a jury from weighing facts which in so short a time would be conclusive. *We can easily see how delay, in such a case as the present, might have rendered it very difficult to get at the truth, or to meet a false charge. Whether the difficulty actually appeared, we cannot tell; but it was before the jury, and they should have been allowed to weigh it.* It would be, for example, somewhat difficult for defendant, without special reasons, to be able to know or show the weather, or the precise conditions of the roads, or who were on it, at a certain hour of the day, six years before. The plaintiff himself could not fix the day of his accident nearer than 'January 20 or 22, as near as I can recollect,' and no other witness fixes the day at all. There would be a similar difficulty in finding out, after such a lapse of time, what injuries were suffered and their treatment. Small shades of difference in facts might be decisive on one side or the other. Delay may or may not have been faulty, and the difficulty created by it may have been more or less; but it cannot be said that a jury would have no right to consider it in all its bearings." 44 N.W. 158, 159. (Emphasis supplied.)

A case exactly in point is that of *Hubenthal v. Gibbons*, 168 Iowa 630, 150 N.W. 1067:

“The defendant requested the court to give to the jury the following instruction 16:

‘The jury is instructed that, while the defendant, Gibbons, does not plead the statute of limitations as a legal defense to this action, nevertheless, if the jury find from the evidence that, after the time the plaintiff claims he paid the note in controversy, said defendant, Gibbons, visited Keokuk on business and pleasure on several occasions, he (Gibbons) met and conversed with plaintiff, Hubenthal, and if you further find from the evidence that said Hubenthal did not say or intimate to Gibbons anything concerning said note, or that he had paid the said note, or that said Gibbons was indebted to him in any way, and if you further find from the evidence that the plaintiff, Hubenthal, made no demand of any kind on said Gibbons to pay said note until August 6, 1907, such facts should be considered by you in connection with all the facts given in evidence in determining wherein lies the truth of the controversy.’

This was refused. Nor was the subject referred to in any manner in the instructions given.

We think that the requested instruction was peculiarly appropriate to the evidence in the case. Except for the nonresidence of the defendant, the law would have conclusively presumed payment by reason of the lapse of time. Because of the nonresidence, the defendant was not entitled to this conclusive presumption. *But, under the circumstances shown, the long silence of the*

plaintiff was very significant, and clearly warranted an inference by the triers of fact that the debt had in some manner been satisfied. It was clearly the right of the defendant to have the attention of the jury directed to such fact. In the light of the long acquiescent conduct of all the parties to the contract, the facts shown in support of the defense are very persuasive. It is not readily conceivable that such a transaction could have been so completely forgotten by all the parties in interest if it had not been closed in some manner. So far as appears the plaintiff never would have awakened to his cause of action were it not that in 1907 the Commercial Bank failed and went into bankruptcy. This note was found among the other old papers and was delivered to the plaintiff. Thereupon he promptly drew on the defendant for \$400 through a Chicago bank. We think it clear that the defendant was entitled to the requested instruction, and that its consideration by the jury was highly important to a just determination of the case." 150 N.W. 1067, 1068. (Emphasis supplied.)

B. It is a fundamental rule of instructions that they should state the law of the case for the information of the jury. If there is any evidence tending to support the theory of a party to the case, that evidence should be submitted to the jury under proper instructions.

Greenleaf v. Birth, 34 U.S. 292;

Stewart v. Sonneborn, 98 U.S. 187, 196;

Ranney v. Barlow, 112 U.S. 207, 28 L. Ed. 663;

United States v. Messinger, 68 F. (2d) 234 (C.C.A. 4th);

Maupin v. Baker, 402 Ky. 441, 194 S.W. (2d) 991;

Paddock v. Mason, 187 Va. 809, 48 S.E. (2d) 199;

Smith v. Maher, 84 Okla. 49, 202 Pac. 321, 23 A.L.R. 270.

As Mr. Justice Woods points out, *Ranney v. Barlow*:

“We think there was error in the charges complained of. To test their correctness we must assume the truth of the facts that the testimony submitted to the jury tended to prove. It was the duty of the court to submit to the consideration of the jury the testimony adduced by the defendant to sustain the defense set up in his answer, and the charge should have been based upon the hypothesis that the defenses that the testimony tended to prove were proven.” 112 U.S. 207, 215.

And the court in *Smith v. Maher* is even more explicit:

“It is the duty of the court to submit to the jury under proper instructions the theory of a party to an action, where there is any evidence tending to support it, and where the general instruction given by the court fails to present the theory of a party to an action, and refuses a special requested instruction that in substance presents the theory of such party to the jury, such refusal constitutes reversible error.” 202 Pac. 321, 324.

So, in the present case, where there was undisputed evidence of a considerable delay in the presentation of a claim, and some evidence, albeit disputed, that the claim had never been presented to appellant until

after appellee's discharge, this theory should have been presented to the jury through the requested instruction.

II. THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY THE DEFENDANT IN ITS THIRD PROPOSED INSTRUCTION, THAT: "IN THIS CASE THERE IS CONFLICTING TESTIMONY ON THE PART OF THE PLAINTIFF AND THE DEFENDANT. THE CREDIBILITY OF THE WITNESSES (154) IS A MATTER WHICH IT IS WITHIN YOUR PROVINCE TO DETERMINE. YOU ARE INSTRUCTED THAT THE FACT THAT THE PLAINTIFF MAY HAVE SUFFERED A LONG PERIOD OF TIME TO ELAPSE WITHOUT MAKING DEMAND OR BRINGING SUIT FOR THE ALLEGED ITEMS OF INDEBTEDNESS FOR WHICH HE SUES, IS A MATTER WHICH MAY BE CONSIDERED BY YOU IN PASSING UPON THE CREDIBILITY OF THE PLAINTIFF."

Appellee's entire case depended on his own testimony. Any evidence tending to affect belief in his credibility, and thus to establish the theory of the defense, should have been submitted to the jury by the instructions. It is unnecessary to reiterate at this point the arguments previously made herein on this point.

Delay in presenting a claim or demand may be cogent evidence that the party has little faith in it, or that it is advanced from improper motives.

As the court stated in *Walker v. Harvey* (C.C.A. 3rd) 108 Fed. 741, 742:

"As bearing upon the credibility of the witnesses and the probabilities of the case, we cannot say that any error was committed by the court in saying to the jury that they might take into consideration the delay of the plaintiffs in bringing

suit. That delay was most unusual, and was a circumstance unfavorable to the plaintiffs.”

The court’s general instructions did not call the jury’s attention to this pertinent feature of the evidence. This was a prejudicial error.

CONCLUSION.

In summarizing, appellant submits:

I.

The trial court committed prejudicial error in refusing to instruct the jury on the question of the plaintiff’s delay in submitting his claim, as requested by appellant in its “Second Proposed Instruction”.

II.

The trial court committed prejudicial error in refusing to instruct the jury that the plaintiff’s delay in submitting his claim could be considered by them in weighing his credibility, as requested by appellant in its “Third Proposed Instruction”.

For the foregoing reasons, we believe that the judgment should be reversed.

Dated, Anchorage, Alaska,
August 13, 1949.

Respectfully submitted,

WENDELL P. KAY,

WARREN N. CUDDY,

Attorneys for Appellant.



No. 12,231

IN THE

United States Court of Appeals
For the Ninth Circuit

ALASKA AIRLINES (an Alaska Corpora-
tion),

Appellant,

vs.

ARTHUR J. OSZMAN,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

J. L. MCCARREY, JR.,

Anchorage, Alaska,

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JURISDICTIONAL STATEMENT.

STATEMENT OF THE CASE.

The Appellee accepts the jurisdictional statement of Appellant. Appellee generally accepts the statement of the case submitted by the Appellant and admits that such statement of the case fairly presents the views and circumstances which give rise to the questions presented in this appeal.

THE EVIDENCE.

As is set forth in Appellant's statement, the Appellee went to work for the Appellant on or about the 4th or 5th day of May, 1944, (T.R. 26) as Operations Manager of the company, to be based at Juneau, Alaska, and the Appellee testified that he was to be reimbursed for his transportation from Minneapolis to Anchorage after he had been working in the employ of the Appellant for a period of six months (T. R. 27). The Appellee further testified that he stayed in the employ of the Appellant for a period in excess of thirteen months (T.R. 28) and on rebuttal the Appellee testified that between the 15th and 20th day of June, 1945, or prior to his first termination of employment with the Appellant, that he submitted detailed expenses set out in recap sheets to the then president, T. N. Law, (T.R. 178) at which time the Appellee testified that the then president, Mr. T. N. Law, asked Mr. Hedman "to give it his immediate attention, as they were, in his opinion, long overdue and would appreciate having mine balanced out", (T. R. 179). The Appellee further testified on rebuttal that other detail sheets submitted for the months of February and March, 1947, were "very much in detail, itemized, each expenditure on the day which they occurred", (T.R. 179). This, the Appellee testified to after he had been asked the following question, "Were those detail sheets, I will ask you, similar in nature to the two detail sheets you submitted for February and March in Seattle?" (T.R. 179).

None of the foregoing testimony of the Appellee was denied by the Appellant, nor was there any proof submitted at the trial to rebut the same. And, as a matter of fact, the Appellant's witness, Joseph E. Griffin, admitted that he would have paid part of the expenses for the months of February and March of the year, 1949, as he felt that they were "legitimate expenses and we would pay it" (T.R. 167).

In reviewing the transcript of record in its entirety, the Appellant did not introduce any evidence nor any witnesses to disprove Appellee's claim against the Appellant, other than a general denial set up in the answer by the Appellant, and the testimony of the Appellant's only witness, Joseph E. Griffin, who testified that there was no account payable to the Appellee on the books of the corporate Appellant, at any time (T.R. 162). Yet, the same witness did not come into the employ of the Appellant until the 4th day of February, 1946 (T.R. 160) or until nine months after the Appellee had been in the employ of the Appellant.

A thorough study and investigation of the evidence and proof submitted by the Appellant does not disclose that the Appellant produced any evidence, either documentary or by witnesses, to prove that the Appellee had been paid for the expenses incurred by the Appellee in the normal course of his employment as Operations Manager, and it is the opinion of the Appellee that had a motion been made for a directed verdict after the Appellant had rested his case that the court would have granted and ordered a directed

verdict, because the Appellant did not deny that it owed money, but contended only that there was no account payable to Appellee set up on the books at that time (T.R. 162).

ARGUMENT.

- I. THE COURT PROPERLY REFUSED TO INSTRUCT THE JURY, IN THE TERMS REQUESTED BY THE APPELLANT, CONCERNING APPELLEE'S ALLEGED DELAY IN SUBMITTING HIS CLAIM.

As is indicated by the statement of the case the Appellee sued the Appellant for money expended by the Appellee for the use and benefit of the Appellant, and Appellee submitted proof of recurring demand for payment, not denied by the Appellant, except insofar that no account payable appeared on Appellant's books which were, admittedly, in poor condition.

Assuming in fact that a material issue was formed, it was properly within the province of the trial court to refuse to charge as requested by Appellant that:

“In this case there has been conflicting testimony as to whether or not the *plaintiff* made prompt demands for the payment of the amounts which *he* claims. You are instructed that the fact that the *plaintiff* may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which *he* now sues, is susceptible of various explanations consistent with *his* theory of the justness of his claim, and it is for you to say whether or not the *plaintiff* has offered one that is satisfactory or not. (Emphasis supplied).

It suffices to point out that the defendant is not mentioned in the proposed instruction and the conduct of the plaintiff is stressed. The trial court properly denied the requested instruction because the instruction singled out the sole testimony and sole conduct of plaintiff, and in addition emphasized one element of evidence which would mislead the jury. *Greene v. Donner*, 198 Wis. 122, 223 N.W. 427, (Sup. Ct. Wis. 1929).

The partial vice of the proposed instruction is set forth by the court in *Landrum v. St. Louis & S. F. R. Co.*, 132 Mo. A. 717, 112 S.W. 1000 (K.C. Ct. of App. 1908) at p. 1001:

“The defendant asked the following instruction which the court refused to give, which action of the court is assigned as error, to wit: ‘The court instructs the jury that in passing on this case and the evidence, they may consider, with all the other facts and circumstances in evidence, the fact that plaintiff requested defendant’s station agent not to report the accident, and the fact that plaintiff made no claim against defendant on account of her alleged injuries for over a year thereafter, as bearing on the question of the manner in which her injuries were received’. This instruction is an example where certain facts are singled out for the consideration of the jury, and therefore given special importance over other facts of equal or greater importance. It is sufficient to say that no instances can be found where such a practice has not been condemned by the appellate courts of this state.”

The proposition stated in the *Landrum* case is not an isolated instance of the rule. The courts have consistently ruled that the selective stress of certain evidence by the trial court in its instructions to the jury may be so unfair to the Appellee, and so violative of the reasonable discretion of the trial court, that the instruction may constitute reversible error. *Maryland Casualty Co. v. Dunlap*, 68 F. (2d) 289 (CCA 1st 1933).

Again, in a case concerning a disputed contract which raised similar problems, on appeal, of alleged delay of claim, the court declared:

“Plaintiff claimed pay for certain extras. The defendant gave evidence tending to show that the cost of these was not charged upon the plaintiff’s books of accounts until the controversy arose over the contract, and that it demanded only the balance of the contract price. Error is assigned upon the refusal of the court to instruct the jury that they should consider these facts in determining whether the alleged extras were or were not included in the contract. It is not good practice for the trial judge to select a portion of the testimony and give it prominence by instructing the jury that they should consider it. If the trial judge undertakes to refer to the evidence bearing upon a disputed point, he should carefully state it all on both sides. This request was faulty in calling attention to only one part of the evidence. It was not error to refuse it. The judge instructed the jury that, if they believed the testimony, on the part of the defendant, these items were included in the contract and plaintiff

could not recover; but if they believed the testimony on the part of the plaintiff, they were not included in the contract, and the plaintiff could recover for them. No error is assigned upon this instruction. It submitted to the jury all the evidence on the question.”

McKinnon Boiler & Machine Co. v. Central Michigan Land Co., 156 Mich. 11, 120 N.W. 26, at p. 28, (Sup. Ct. Mich. 1909).

The trial court in the instant case submitted to the jury all the evidence on the question. Moreover, in refusing to charge as requested by appellant, the court adhered to the traditional general rule governing instructions to the jury that where under the general instructions the jury must have known that all the evidence on the subject was to be considered in determining the issue, an instruction that the jury, in determining the issue, should consider specified evidence together with other evidence is improper, as singling out a portion of the evidence and as specially directing that it be considered.

Still v. San Francisco & N.W. Ry. Co., 154 Cal. 559, 20 LRA (N.S.) 322, 98 Pac. 672 (Sup. Ct. Cal. 1908).

In this respect a passing salute is due to the authorities cited by Appellant. Except for the authorities specifically hereafter mentioned all the cases cited by Appellant are authority only for the proposition that the evidence which the appellant requested to be charged is normally admissible at the trial, and

such evidence when properly admitted at the trial is not to be denied to the jury by a specific instruction of the trial court to the jury to exclude the evidence from its deliberations. *Shadock v. Alpine Plank-Road Co.*, 79 Mich. 7, 44 N.W. 158 (Sup. Ct. Mich. 1889). *The trial court in the instant case, did admit the evidence of the alleged delay, and did not direct the jury to exclude such evidence from its deliberation.* The evidence was included in the general charge.

Appellant cites the decision of *Walker v. Harvey*, 108 Fed. 741, (CCA 3rd 1901) as authority for the proposition that the trial court was required to direct the attention of the jury specifically to the alleged delay in making claim. In that case the delay was for six years, and "unusual"; the appellate court on reviewing the whole case and the whole instruction declared, indecisively, that "we cannot say that any error was committed". The evidence of the delay in making claim in the case of *Hubenthal v. Gibbons*, 168 Iowa 630, 150 N.W. 1067 (Sup. Ct. Iowa 1915), cited by Appellant, was so unusual, under all the circumstances, that it shocked the conscience of the appellate court. The appellate court stated, at page 1068,

"No explanation is given of the silence of 27 years".

II. THE COURT PROPERLY REFUSED TO INSTRUCT THE JURY, IN THE TERMS REQUESTED BY APPELLANT, THAT THE PLAINTIFF'S DELAY IN SUBMITTING HIS CLAIM COULD BE CONSIDERED BY THEM IN WEIGHING HIS CREDIBILITY.

It was properly within the province of the trial court to refuse to charge as requested by Appellant that:

“In this case there is conflicting testimony on the part of the plaintiff and the defendant. The credibility of the witnesses is a matter which it is within your province to determine. You are instructed that the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he sues is a matter which may be considered by you in passing upon the credibility of the plaintiff”.

In refusing to so charge the trial court adhered to the rule concerning instructions on credibility set down by the court in *Fleming v. Husted*, (CCA 8th 1947), 164 F. (2d) 65, at p. 70 (certiorari denied, 68 Sup. Ct. 661, 333 U.S. 843):

“The portion which the court refused to give was an attempt to single out and place emphasis in the jury's mind upon plaintiff's previous statements and the circumstances and testimony corroborative of them, with an implied minimizing of the consideration to which his conflicting testimony on the trial was entitled. *It is not error to refuse to give a requested instruction which singles out for special emphasis part of the evidence upon a question that the jury is to decide.*

Rio Grande Western R. Co. v. Leak, 163 U.S. 280, 288, 16 S. Ct. 1020, 41 L. Ed. 160. *Situations may exist where it is permissible for the court to give such an instruction, but even then the matter is entirely one for the trial court's discretion.* The court's instructions here properly made general reference to plaintiff's previous statements and correctly advised the jury that 'you should carefully consider and weigh all the evidence in the case and return such verdict as your conscience will approve, based alone on the evidence and these instructions and free from influence, bias, prejudice or sympathy.' (Emphasis supplied).

In a similar request for instruction in an action based on breach of warranty, the trial court, in *W. T. Adams Mach. Co. v. Turner*, 162 Ala. 351, 50 So. 308 (Sup. Ct. Ala. 1909), refused to charge as "Special Charge 2" that,

"It is the duty of the jury to look at the time when the plaintiff made complaint to the defendant to determine whether any defect existed in the engine and boiler at the time the defendant sold the engine and the boiler to the plaintiff."

The appellate court comments tersely:

"Special Charge 2 refused to defendant was properly so treated. It probably has other vices; but it will suffice to note that it undertakes to select and emphasize one element of fact in the evidence."

Accord: *Campbell v. Bates*, 143 Ala. 338, 39 So. 144, (Sup. Ct. Ala. 1905).

In the instant case the trial court gave a general charge to the jury on the credibility of the witnesses and the evidence but those portions should not be separated from the warp and the woof of the whole charge. No attempt can be made here to scrutinize separate passages or portions of the trial court's charge apart from their context as isolated verbal phenomena. Considered as a whole, the instructions of the court fairly and substantially presented to the jury the issues to be decided, and the judgment should not be disturbed on appeal.

Goodyear Fabric Corp. v. Hirss, 169 F. (2d) 115 (CCA 1st 1948);

Missouri, K. & T. Ry. Co. v. Jackson, 174 F. (2d) 297 (CCA 10th 1949);

Rowe v. Dixon, 196 P. (2d) 327 (Sup. Ct. Wash. 1948).

CONCLUSION.

The trial court properly refused to instruct the jury, in the terms requested, on the question of plaintiff's alleged delay in submitting his claim because it singled out the sole testimony and sole conduct of plaintiff and thereby emphasized a minor and immaterial element of evidence which would have misled the jury in its deliberations.

Moreover, the instructions, as a whole, fairly and substantially presented to the jury the issues of the

case within the reasonable discretion of the trial court and the verdict should not be disturbed on appeal.

The judgment appealed from should be affirmed.

Dated, Anchorage, Alaska,

November 18, 1949.

Respectfully submitted,

J. L. MCCARREY, JR.,

Attorney for Appellee.

United States
Court of Appeals
for the Ninth Circuit

MELVIN E. WALLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Eastern District of Washington,
Southern Division

FILED

JUN 9 - 1949

PAUL P. O'BRIEN,
CLERK

No. 12232

United States
Court of Appeals
for the Ninth Circuit

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—cross 59

Klassen, D. C.

—direct 114

—cross 119

Middleton, James

—direct 158

—cross 162

Robinson, Kenneth

—rebuttal, direct 260

—cross 263

—redirect 265, 267

—recross 266, 267

Spaulding, James V.

—direct 133, 150

—cross 153

Williamson, Charles F.

—direct 71

—cross 74

—redirect 82

—recross 84

Verdict 3

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

HARVEY ERICKSON,
United States Attorney.

FRANK R. FREEMAN,
Assistant United Attorney,
Federal Building,
Spokane, Washington,

Attorneys for Plaintiff and Appellee.

WALTER J. ROBINSON, JR.,
Miller Building,
Yakima, Washington, and

JAMES P. SALVINI,
Sunnyside, Washington,

Attorneys for Defendant and Appellant. [1*]

* Page numbering appearing at foot of page of original
certified Transcript of Record.

In the District Court of the United States for the
Eastern District of Washington,
Southern Division

No. C-4217

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN E. WALLER,

Defendant.

INDICTMENT

VIO: Pub. Law 806—80th Congress, Sec. 15, Par.
C. Theft of Property of Commodity Credit Cor-
poration.

The Grand Jury charges:

That on or about the 23rd day of August, 1948,
at Sunnyside, in the Southern Division of the
Eastern District of Washington, Melvin E. Waller
did wilfully steal, remove, and convert to his own
use, property owned by the Commodity Credit Cor-
poration, to-wit: sixteen (16) tons of White Rose
Irish potatoes.

Dated this 21st day of December, 1948.

A True Bill.

/s/ E. D. (Illegible),
Foreman.

/s/ FRANK R. FREEMAN,
Asst. United States Attorney.

Presented to the Court by the Foreman of the

Grand Jury, in open Court, in the presence of the Grand Jury and filed in the United States District Court for the Eastern District of Washington, Dec. 21, 1948.

/s/ A. A. LaFRAMBOISE,
Clerk. [2]

[Title of District Court and Cause.]

ARRAIGNMENT AND PLEA

Now, on this 18th day of January, 1949, into court comes the defendant, Melvin E. Waller, with counsel, Walter J. Robinson, for arraignment under the Indictment heretofore filed against him, and being interrogated by the Court as to his plea thereto, defendant answers that he desires to enter a plea of Not Guilty, which plea is received by the Court and ordered entered on the records of the Court.

[Endorsed]: Filed Jan. 18, 1949. [3]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Entitled Cause, find the defendant, Melvin E. Waller, Guilty as charged in the Indictment.

/s/ JOHN V. WHITEMAN,
Foreman.

[Endorsed]: Filed Feb. 16, 1949. [312]

[Title of District Court and Cause.]

MOTIONS FOR A NEW TRIAL

Comes now the defendant above named and moves the Court to grant him a new trial upon the ground that the same is required in the interest of justice.

Without waiving the foregoing motion, and in the alternative, the defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the close of the evidence offered by the government.

2. The Court erred in denying defendant's motion for acquittal made at the close of all the evidence, if said motion is denied.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is not supported by substantial evidence.

5. There were irregularities in the proceedings of the Court, jury, and plaintiff, orders of the Court, and abuse of discretion by which the defendant was prevented from having a fair trial.

6. The Court erred in admitting plaintiff's Exhibit 12, to which objection was made.

7. The Court erred in charging the jury and in refusing to charge the jury as requested.

8. There were errors in law occurring at the trial and called to the Court's attention or excepted

to by the defendant at the time [313] said errors were made.

Dated this 21st day of February, 1949.

/s/ JAMES P. SALVINI,
/s/ SAVINI & ROBINSON,
Attorneys for Defendant.

Copy mailed to Mr. Harvey Erickson, United States Attorney, this 21st day of February, 1949.

[Endorsed]: Filed Feb. 21, 1949. [314]

EXCERPTS FROM COURT MINUTES

November, 1948, Term. March 11, 1949. 17th day.
Court Convened at 10:00 a.m.

Present: Hon. Sam M. Driver, Judge; A. A. La-Framboise, Clerk; Stanley Taylor, Reporter; Harvey Erickson, U. S. Attorney; R. R. Isaacs, Deputy U. S. Marshal; Charles W. Carlile, Deputy U. S. Marshal; Ray Kurtz, U. S. Probation Officer.

PROCEEDINGS

* * * *

[Title of Cause.]

Defendant's motion for judgment of acquittal argued by Walter R. Robinson for defendant. Motion denied.

Defendant's motion for new trial argued by Walter R. Robinson for defendant. Motion denied.

It is stipulated by counsel that copy of plaintiff's exhibit 19 may be substituted and original of said exhibit is withdrawn by defendant.

The Court thereupon sentenced defendant to One

Year and Six Months and to pay a fine of \$600.00.

Bail bond pending appeal is fixed at \$1000.00 and defendant to remain on present bail and execution of sentence suspended until time for appeal has expired. Judgment and Sentence signed. [315]

District Court of the United States for the Eastern
District of Washington, Southern Division

No. C-4217

UNITED STATES OF AMERICA,

vs.

MELVIN E. WALLER.

JUDGMENT AND COMMITMENT

On this 11th day of March, 1949, came the attorney for the government and the defendant appeared in person and by counsel, Walter J. Robinson and J. B. Salvini.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violation of Public Law 806, 80th Congress, Section 15, Paragraph C—Theft of Property of the Commodity Credit Corporation, as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby com-

mitted to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year and Six (6) Months and to pay a Fine of \$600.00 without costs.

It Is Adjudged that said defendant be further imprisoned until payment of said Fine or until said defendant is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ SAM M. DRIVER,

United States District Judge.

Presented by

HARVEY ERICKSON,

U. S. Attorney.

[Endorsed]: Filed March 11, 1949. [316]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant—Melvin E. Wal-
ler, Sunnyside, Washington.

Name and Address of Appellant's Attorneys—
John Gavin and Walter J. Robinson, Jr., 409
Miller Building, Yakima, Washington, and James
P. Salvini, Sunnyside, Washington.

Offense—Theft of property owned by the Com-
modity Credit Corporation in violation of Public

Law 806—80th Congress, Section 15, Paragraph C.

Concise Statement of Judgment or Order Giving Date, and any Sentence—Judgment of conviction and sentence of \$600.00 fine and eighteen months' imprisonment. Judgment dated March 11, 1949.

The defendant is on bail and not now confined.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated March 17, 1949.

/s/ MELVIN E. WALLER,
/s/ WALTER J. ROBINSON, JR.,
Of Counsel for Appellant.

The above notice of appeal was filed with the Clerk of the above-entitled Court in duplicate on March 17, 1949.

ARAM A. LaFRAMBOISE,
Clerk.

By /s/ THOMAS GRANGER,
Deputy Clerk.

Copy mailed to Harvey Erickson, U. S. Attorney, March 17, 1949. A. A. LaFramboise, Clerk.
By Thomas Granger, Deputy.

[Endorsed]: Filed March 17, 1949. [317]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Know All Men by These Presents, That the undersigned Melvin E. Waller herewith deposits the sum of One Thousand Dollars (\$1,000.00), as a bond for the appearance of said Melvin E. Waller before said Court at the time herein specified.

Signed and sealed this 17th day of March, 1949.

The Condition of the above obligation is that whereas, a judgment of conviction of a felony charge has been filed against Melvin E. Waller with the United States District Clerk for the Eastern District of Washington, adjudging him to be guilty of the offense of having stolen property owned by the Commodity Credit Corporation, and he has appealed to the Court of Appeals for the Ninth Circuit from such judgment of conviction and the sentence thereafter imposed;

Now, Therefore, if the said Melvin E. Waller shall appear before the United States District Court at Yakima, Washington, at such time as he is notified so to do by the Circuit Court and from day to day thereafter as he is directed so to do, and shall hold himself subject and amenable to the orders of said District Court until finally discharged by said Court or until committed to the custody of the Attorney General or his authorized representative for imprisonment, then this obligation to become null and void, and the money herewith deposited as bail as aforesaid, to be returned under

order of this Court, otherwise to remain in full force and effect and said bail to become subject to forfeiture to the United States of America.

/s/ MELVIN E. WALLER.

Approved: March 18, 1949.

/s/ SAM M. DRIVER,
U. S. Judge.

Signed in the presence of:

/s/ WALTER J. ROBINSON, JR.

Notices relative to this case will reach defendant if mailed to the following address: c/o Herrett Trucking Co., Inc., Sunnyside, Wn.

[Endorsed]: Filed March 17, 1949. [318]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled District Court:

Comes now the above-named defendant, who has appealed to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause, and designates the following as the portions of the records, proceedings and evidence to be contained in the record on appeal:

1. Indictment, filed December 21, 1948.
2. Records of Court showing arraignment and plea of "not guilty."
3. Reporter's complete transcript of trial proceedings.
4. All exhibits.

5. Records of Court showing verdict of jury.
6. Records of Court showing defendant's motion for judgment of acquittal at close of all evidence in the case.
7. Defendant's motion for a new trial, filed February 21, 1949.
8. Records of Court showing denial of motions for judgment of acquittal and for new trial.
9. Judgment and commitment.
10. Notice of appeal.
11. This designation of records and affidavit of service by mail.
12. Statement of points. [319]

You will please include this data in making up the record on appeal.

Dated April 14, 1949.

/s/ WALTER J. ROBINSON, JR.,
Of Counsel for Defendant
(Appellant).

Copy mailed to Hon. Harvey Erickson, United States Attorney.

[Endorsed]: Filed April 14, 1949. [320]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the defendant above named as appellant and sets forth the following statement of the points upon which he intends to rely on the appeal:

1.

The Court erred in denying the defendant's motion for judgment of acquittal made at the close of the evidence offered by the Government.

2.

The Court erred in denying defendant's motion for acquittal made at the close of all the evidence.

3.

The Court erred in over-ruling the objection on behalf of the defendant to the receipt of Government Exhibit 12 in evidence.

4.

The Court erred in charging the jury to the objectionable portion of which charge the defendant objected.

5.

The Court erred in denying the defendant's motion for a new trial.

6.

The verdict is contrary to the weight of the evidence.

7.

The verdict is not supported by substantial evidence. [321]

8.

There were irregularities in the proceedings of the Court and abuse of the Court's discretion by which

the defendant was prevented from having a fair trial.

Dated this 14th day of April, 1949.

/s/ WALTER J. ROBINSON, JR.,
Of Counsel for Defendant
(Appellant).

Copy mailed to Hon. Harvey Erickson, United States Attorney.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 14, 1949. [322]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing type-written pages numbered 1 to 323, inclusive, to be the original indictment, the original arraignment and plea of not guilty, the original reporter's transcript of trial proceedings, the original exhibits 1 to 19, inclusive, the original verdict, the original motion for new trial, a true and correct copy of the records of court showing denial of motions for judgment of acquittal and for new trial, the original judgment and commitment, the original notice of appeal, the original bail bond on appeal, the original designation of contents of record on appeal and affidavit of service by mail, and the original statement of points in the above-entitled cause, as are necessary to the hearing of the appeal therein as

called for by the designation of the record on appeal filed by counsel for the Appellant, Melvin E. Waller, and that the same constitutes the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing record as called for in Appellant's designation of record on appeal amount to \$2.50 and the same has been paid in full by Walter J. Robinson, Jr., attorney for said Appellant.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said District Court at Yakima, Washington, in said District, this 22nd day of April, 1949.

(Seal)

A. A. LaFRAMBOISE,
Clerk of said District Court.

In the District Court of the United States for the
Eastern District of Washington,
Southern Division

No. C-4217

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN E. WALLER,

Defendant.

RECORD OF PROCEEDINGS
AT THE TRIAL

Be It Remembered, that on the 14th day of February, 1949, the above-entitled cause came regularly on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting with a jury.

The plaintiff appearing by Harvey Erickson, United States Attorney for the Eastern District of Washington, of Spokane, Washington.

The defendant appearing personally and by his attorneys, Walter J. Robinson, Jr., of Yakima, Washington, and James P. Salvini, of Sunnyside, Washington.

Whereupon, the following proceedings were had and done, to wit: [8*]

A jury of twelve was duly impaneled and sworn to try the case, being the following named persons:

1. Henry B. Marks; 2. Grace Riggs; 3. George D.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Ennis; 4. Theodore T. Edmison; 5. Joseph E. Ditter; 6. John V. Whitehair; 7. Reuben May; 8. Emerald C. Sullivan; 9. Wilfred G. Farley; 10. Austin Johnson; 11. Maude Frear; 12. Wayne Smith.

(Short recess.)

(Whereupon, the following proceedings were had without the presence of the jury.)

Mr. Robinson: The jury isn't in the box, but we wish to invoke the rule of exclusion of the witnesses at this time, your Honor.

The Court: All right; are the witnesses all in the courtroom, Mr. Erickson?

Mr. Erickson: I don't know how many of them are here.

The Court: And how about your witnesses, Mr. Robinson, are they here? [9]

Mr. Robinson: Well, I don't think any of them are. Some of the ones I'll call are also subpoenaed by the government.

The Court: The rule, of course, will apply to both sides. However, the United States Attorney will have the option of having one witness remain with him. Who do you wish to remain?

Mr. Erickson: Mr. Garner.

The Court: Is he to be a witness?

Mr. Erickson: Yes, William G. H. Garner.

The Clerk: The names as I have them for the government witnesses are Fred Carver, U. S. Garrecht, Charles F. Williamson, D. C. Klassen, R. S. Bruce, James Spaulding, James Middleton, Homer

Waller, Joe V. Caruso, John Catlin, John Chinn, and William G. H. Garner. Mr. Williamson is not here. That's all the witnesses I have subpoenas on.

Mr. Erickson: I think we have another witness, J. B. Kerby.

The Clerk: Have you any other witnesses, Mr. Robinson, that you can give me the name of, please?

Mr. Robinson: I think Mr. Ross Lynch isn't here.

The Clerk: No, he's not here.

Mr. Robinson: None of our witnesses are in the courtroom.

(Whereupon, Fred Carver, U. S. Garrecht, D. C. Klassen, R. S. Bruce, James Spaulding, James Middleton, Homer Waller, Joe V. Caruso, John Catlin, John Chinn, William G. H. Garner, and John B. Kerby were sworn as witnesses on behalf of the [10] plaintiff in this cause.)

The Court: Now, the rule has been invoked here that witnesses must remain out of the courtroom until you've testified and it's clear you're not to testify again, so that you'll all remain out in the corridor and the bailiff will let you know when to come in and testify, and then you'll go out again. In the meantime you shouldn't talk about what your testimony will be, and after you've testified, don't say what you've testified to. That doesn't mean, of course, that you can't talk to the attorneys. I'll ask the attorneys on both sides, if there are other witnesses, to tell them what the rule is, and not to come

into the courtroom. All right, the witnesses may be excused now.

(Whereupon, all the witnesses who were sworn, except Mr. Garner, retired from the courtroom.)

The Court: Anything else before we call in the jury? Call in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

(Whereupon, Mr. Erickson made an opening statement to the jury on behalf of the plaintiff.)

(Whereupon, Mr. Robinson made an opening statement to the jury on behalf of the defendant.)

The Court: While we're waiting for the witness, members of the jury, I think this is a good time to tell you that [11] we'll let you separate during the recess and overnight adjournments, but you're not to talk about the case either among yourselves or with anybody else until the trial is concluded, and I think in this type of case it would be best for you to refrain from reading any newspaper accounts about it or listening to any radio accounts. I don't think they would affect you, but it's best to not listen to them, and then you can be sure you're not being influenced by anything except the evidence in the case and the Court's instructions, and I might say, too, that the Court tries to have these cases proceed in an orderly way according to the rules we apply, and from time to time it's necessary for the Court to rule on objections, or inter-

rupt counsel and make comments about the way he's conducting himself. I want you to know that doesn't indicate anything at all except that the court is trying to run the case in an orderly way, because the Court has no opinion and is not trying to express any about the evidence or the conduct of counsel.

JOHN CHINN,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. State your name, please.

A. John Chinn.

Q. And what is your business, Mr. Chinn?

A. I'm the secretary to the Yakima County Agricultural [12] Conservation Association.

Q. And where is your office?

A. 201 Old Court House.

Q. Do you have to do—does your work have to do with the Production Marketing Administration?

A. It does.

Q. And the sale of surplus potatoes?

A. I'm the buying and shipping representative of the Commodity Credit.

Q. And the Commodity Credit Corporation has the disposal program of potatoes, is that right?

A. We do.

Q. And you're the representative in Yakima?

A. I am.

(Testimony of John Chinn.)

(Whereupon, eligibility certificate, C. F. Williamson, was marked Plaintiff's Exhibit No. 1 for identification.)

(Whereupon, dealer's agreement, Simmons & Sons, was marked Plaintiff's Exhibit No. 2 for identification.)

(Whereupon, dealer's agreement, Pasco Growers, was marked Plaintiff's Exhibit No. 3 for identification.)

(Whereupon, contract with C. F. Williamson was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Erickson): Mr. Chinn, I'll hand you plaintiff's [13] identification 1, and ask you to state what that is.

A. This is an eligibility certificate of application for growing potatoes.

Q. Is that eligibility certificate in your official records and files of C. F. Williamson for 1948?

A. It is.

Q. Signed by Mr. Williamson? A. It is.

Q. And part of your records? A. It is.

Mr. Erickson: I offer plaintiff's 1.

The Court: Let Mr. Robinson see it first.

Q. (By Mr. Erickson): I'll hand you plaintiff's identification 2 and ask you what that is.

A. This is a dealer's agreement for eligible dealers to handle surplus potatoes for Commodity Credit.

(Testimony of John Chinn.)

Q. In that case, that agreement is between whom?

A. This agreement is for Mr. Simmons and Sons, eligible dealers.

Q. And signed by Simmons and Sons, is that correct? A. It is.

Q. And that's the signature of Claus Peters, do you recognize his signature? A. I do.

Q. Is that part of the official records and files and is that [14] the contract between Simmons and Sons and the Commodity Credit Corporation?

A. It is.

Mr. Erickson: I offer 2 in evidence.

Q. (By Mr. Erickson): I hand you plaintiff's identification 3 and ask you to state what identification 3 is.

A. Potato dealer's agreement. It's the same as the other one, only this one is for Pasco Growers.

Q. Signed by the Pasco Growers?

A. Signed by their representative.

Q. Is it the official contract appearing in your files for the 1948 season? A. It is.

Q. Between the Commodity Credit Corporation and the Pasco Growers? A. It is.

Mr. Erickson: I offer 3.

Q. (By Mr. Erickson): I hand you plaintiff's identification——

Mr. Robinson: Your Honor, these are a little different category from the others. I wish to object to the introduction of identifications 1, 2 and 3 on the ground that they're irrelevant and immaterial to any phase of this case whatsoever. Identification

(Testimony of John Chinn.)

1 is Mr. Williamson's—not his purchase of the potatoes involved here, but his sale of other potatoes to the government, [15] which have no connection whatsoever——

The Court: I think I'll excuse the jury until 1:30, and then we can talk this over in their absence. You may retire, members of the jury.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: Now, I might be better able to understand the argument if I knew what these are. What's the purpose of introducing these?

Mr. Erickson: The purpose is to give the background to show that these are Commodity Credit Corporation potatoes handled in the usual way by the warehouses handling potatoes for the Commodity Credit Corporation. These are for the identical potatoes later alleged to have been stolen.

The Court: These are the same potatoes?

Mr. Erickson: Yes, these papers are part of the chain of title showing the government's chain of title to the potatoes, beginning with the grower who raised them down to the time the grower got them back again for stock feed.

Mr. Robinson: The first identification there is the contract under which Williamson grows potatoes, and has nothing to do with the potatoes that were involved here which the government's—— [16]

The Court: Isn't that a contract with the Commodity Credit Corporation, that number 1?

(Testimony of John Chinn.)

Mr. Robinson: Well, it's a contract with the Yakima County Agricultural Conservation Committee.

Mr. Erickson: There's a certification on the bottom of it that this is to certify that the producer has agreed to the established conditions for participating in the potato price program. The County Agricultural Conservation Committee is an agent of the Commodity Credit Corporation to administer the program in Yakim, and first we have to show——

The Court: The purpose of that is to show Mr. Williamson was in the program?

Mr. Erickson: Yes.

The Court: And raised these potatoes pursuant to the program?

Mr. Erickson: Yes.

Mr. Robinson: The ones purchased for stock feed had no connection with the ones sold to the government. There was no necessary connection or arrangement there at all. Mr. Erickson stated to the jury that the stock feeder buys back potatoes from the government under a contract I think he's going to offer subsequently, which we feel is certainly relevant, but this and the matter of the warehouses' arrangements or contracts with the government [17] hasn't anything to do with this matter here, it seems to me.

Mr. Erickson: This is purely background, of course, to show the beginning of the title of the potatoes, who grew them, how they were traced down and finally sold back for stock feed potatoes. These are the same potatoes.

The Court: Well, I think I'll admit them. I think

(Testimony of John Chinn.)

they have a background relevancy here. You haven't identified 4, have you?

Mr. Erickson: No.

The Court: We can't take any testimony in the absence of the jury, so I'll admit 1, 2 and 3, and we may as well recess now until 1:30.

(Whereupon, Plaintiff's Exhibits Nos. 1, 2 and 3 for identification were admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 1 is set out in full at page 286 of this printed Record.]

[Printer's Note: Plaintiff's Exhibit No. 2 is set out in full at page 291 of this printed Record.]

[Printer's Note: Plaintiff's Exhibit No. 3 is set out in full at page 307 of this printed Record.]

The Court: I'd like to have counsel step into my chambers for a few minutes before we go out to lunch, just after we recess here.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington

Monday, February 14, 1949—1:30 o'clock p.m.

(All parties present as before, and the trial was resumed.)

(Whereupon, the following proceedings were had within the [18] presence of the jury.)

(Testimony of John Chinn.)

Direct Examination

(Whereupon, Mr. Erickson read a portion of Exhibit 2 to the jury.)

Q. Now, I'll hand you plaintiff's identification 4, and ask you what that is?

A. This is a contract for sale of fresh potatoes for livestock feed.

Q. To whom? A. C. F. Williamson.

(Whereupon, Form VF 111, terms and conditions, was marked Plaintiff's Exhibit No. 5 for identification.)

Q. I'll hand you plaintiff's identification 5, and ask you what that is?

A. This is form VF 111; it's in regards to the terms and conditions of potatoes sold as livestock feed.

Q. Fresh Irish potatoes for livestock feed?

A. Yes, sir.

Q. Is plaintiff's identification 5 the one that is referred to in plaintiff's identification 4?

A. I don't know whether I've got you right on that or not.

Q. Well, let me ask you again, I'll hand you plaintiff's identification 4, and ask you to examine that and plaintiff's identification 5. [19]

A. Right.

Q. Does plaintiff's identification 4 refer to plaintiff's identification 5? A. It does.

Mr. Erickson: I offer both 4 and 5.

Mr. Robinson: I'd like to take them up separately, if the Court please.

(Testimony of John Chinn.)

Voir Dire Examination

By Mr. Robinson:

Q. Mr. Chinn, with reference to plaintiff's identification 4, that purports to be an announcement, with mimeographed signature of Mr. Claus Peters, and then an order, is that correct?

A. This is a contract signed by Mr. Peters; is that what you mean?

Q. It's headed with the words "Announcement of Sale" how to obtain potatoes, signed above Mr. Peters' signature, and then the word "Order" appears on it. The date appearing after Mr. Williamson's typed name is August 19, is that correct?

A. Yes.

Q. Was this contract completed on August 19?

A. You mean that he received the potatoes at that time?

Q. No; were the provisions that are typed in filled in on that date? A. Yes. [20]

Q. Mr. Williamson signed this in blank on that date, did he not? A. I don't know.

Q. It wasn't filled in at the time that he signed it, was it? A. I don't know; no, I don't.

Q. You will observe—was all the typing done at the same time? A. On those contracts?

Q. Yes.

A. Some of them were and some they weren't.

Q. Some were typed in later on? A. Right.

Q. Some were signed in blank and typed in at a later time, is that not correct? A. Yes.

Q. Please notice the right portion of this, Mr.

(Testimony of John Chinn.)

Chinn, and tell the jury if this contract doesn't cover potatoes purchased on September 22?

A. That's the date that's on there.

Q. In other words, this instrument purports to be a contract covering potatoes in which you acknowledge receipt of monies paid on August 19 and September 22, isn't that correct? A. Yes.

Q. Mr. Williamson never received a copy of this, did he? [21] A. Yes.

Q. When?

A. I don't know the date, but they're supposed to receive a copy of all cattle feed contracts.

Q. He didn't receive a copy until after September 22, did he?

A. I don't know when he received it. The contract goes to the state office and then it's sent out.

Mr. Robinson: No objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 4 is set out in full at page 308 of this printed Record.]

Voir Dire Examination—(Continued)

By Mr. Robinson:

Q. Mr. Chinn, with reference to plaintiff's identification 5, which purports to be form FV 111, I'll show it to you so you'll know I'm not fooling you, no copy of that was ever given to the purchaser of stock feed, was it? A. No.

Q. No copy of it was ever read to him at the time that he signed the blank which is the contract,

(Testimony of John Chinn.)

was it? A. State that question again.

Q. No copy of Form 3, I think that's what you usually call it, isn't it?

A. It's Form FV 111.

Q. Is it 111, or Roman numeral III?

A. Well, we call it 111. [22]

Mr. Robinson: Just so we can get our nomenclature straight, your Honor.

The Court: All right.

Q. (By Mr. Robinson): With reference to form FV 111, that was not read to the grower at the time he signed his contract for the potatoes, was it?

A. Neither was the contract read to him.

Q. Nothing was read to him?

A. The contract was given to him and he read the contract, and the forms FV 111 was given to them if they wanted it; in several cases they asked for it: it was laying right there.

Q. Did you mimeograph them?

A. Some of them we did; some of them were sent out from the state office, we ran out. Not those 111.

Q. You didn't distribute those to the purchasers of the potatoes, did you? A. No.

Q. You didn't read them to any of the purchasers?

A. No.

Q. When the purchaser came in to your office during the month of August you fellows were busier than everything trying to move these potatoes through, weren't you? A. Yes.

Q. That was a darn busy season, wasn't it? [23]

A. It was.

Q. You were swamped with potatoes that were

(Testimony of John Chinn.)

delivered to the government, weren't you, at that time? A. Yes.

Q. As a result, when the contract order, exhibit 4, which is the contract, was executed, it was usually signed by the purchasers in blank and there was no discussion of the terms at all, was there?

A. Yes, there was.

Q. In how many cases was there any discussion of the terms of Form FV 111 at the time the grower executed the order form? In how many cases during the month of August?

A. I couldn't tell you, because——

Q. More than three?

A. ——there was seven clerks taking care of that rush, but we took the information, instead of taking time to type it, we wrote all the information on a slip and attached it to the contract, after the man read his contract, and then it was taken in and typed afterwards. We didn't have time at the time.

Q. You mean you took the information that was on the face of the order form, the name, date, place of residence, and delivery schedule?

A. And delivery schedule.

Q. Yes; that's the information you took off? [24]

A. Yes.

Q. You signed the order in blank and you put this information that's contained on the order on a slip of paper, and sent it in to the typist to type up?

A. In some cases.

Q. Yes, and eventually, and in the case of Mr. Williamson after September 22, you sent a copy back down to him?

(Testimony of John Chinn.)

A. A copy went to the state office for approval and was sent back to us and we gave it to him.

Q. In the case of Mr. Williamson it wasn't by the very wording until after September 22, was it?

A. I think so.

Q. Now, with reference to the form FV 111, government's identification 5, you didn't reproduce any of those by any means at all? A. No.

Q. Did you have any mimeographed ones in your office, or multigraphed ones? A. No.

Q. Did you have more than one printing of those forms in your office that you know about?

A. We had several copies; not enough to take care of everybody.

Q. How many growers were altogether involved in this, how many growers and purchasers of potatoes were altogether involved [25] through your office last season? A. Cattle feed?

Q. Yes. A. I do not have the exact amount.

Q. Would you say there was over 5,000, or under?

A. Under.

Q. Under 1,000? A. I'd say yes.

Q. Pretty close to 1,000, possibly?

A. Well, I have no idea. We have a lot of them.

Q. A lot of them. Now, of all of those who purchased potatoes from you by filling out plaintiff's exhibit 4, the contract form, how many did you personally read the provisions of FV 111 to?

A. I didn't read it to anyone.

Q. How many did you personally discuss the provisions in FV 111 relating to any title to the potatoes?

A. A number of persons after reading the con-

(Testimony of John Chinn.)

tract asked for that; it was right there available to them; we handed it to them.

Q. It was in a cabinet, was it not, in your office?

A. It was not, it was right on the main counter where they signed their contract.

Q. When they came up to sign their contract someone waited on them? [26]

A. That's right.

Q. You or one of your assistants?

A. That's right.

Q. And when you did that you had a copy of these orders, identification 4, didn't you? A. Yes.

Q. That was the instrument they had to sign?

A. Yes.

Q. That was the one to which reference was made as to quantity, price, and delivery location, wasn't it?

A. Yes.

Q. And in almost all cases that was the only one to which any reference was made in your conversation with the purchaser, wasn't it?

A. We always gave them the contract to read, and after reading the contract, this was available there for them to read if they wanted it.

Q. As a matter of fact, when they came in to talk to you, you didn't give them the contract to read, you handed it out and they'd say they wanted some potatoes for livestock feed? A. Yes.

Q. And you'd say, "Well, how many do you want?" is that correct?

A. We'd ask them if they was a cattle feeder and was [27] legitimately feeding cattle.

(Testimony of John Chinn.)

Q. And when they said yes, you'd say, "How many do you want?" A. That's right.

Q. And asked them how they wanted them delivered, and where? A. That's right.

Q. And where they wanted to pick them up; and after they made that notation you'd hand it to them to sign?

A. Hand it to them and say, "Here's your contract."

Q. And they'd hand you the money?

A. Some would, and some wouldn't.

Q. Well, they had to pay before you'd authorize delivery?

A. Well, a lot of them didn't know their checks had to be made out to the United States Government, so we handed them the contract and they went after the check.

Q. The next step was they handed the money over to you and you took the contract back and attached a note and waited on the next purchaser, didn't you?

A. That's right.

Q. Now, in the case of Mr. Williamson there was neither any discussion of identification 5, which is form 111, or did he read it or was shown it, isn't that correct?

I. I wouldn't know whether he read it or anything about it. I don't know if I even waited on him.

Q. You don't recall him coming in there at all?

A. I recall him coming in, but I don't know who waited on him. [28] There was six or seven just waiting on people all day long.

Q. When you sent back the copy of the plaintiff's

(Testimony of John Chinn.)

Exhibit 4 to the purchaser you never at any time sent back a copy of Form FV 111, did you?

A. No.

Q. You did not discuss with a single purchaser the specific—any specific provision in Form FV 111—

Mr. Erickson: I object on the ground of repetition. It's been asked twice.

Q. No, your Honor, I'm going to finish the question—pertaining to a clause by which title did not pass, did you? A. Yes, I did.

Q. The specific provision?

A. I couldn't point out exactly who it was, but I know a number of cases where that was read to different growers, farmers, but I couldn't tell you who they were.

Q. You know it was read to two or three, or some very small number, isn't that correct?

A. I personally took care of a few of them. I don't know how many.

Q. A very small percentage out of the total number, wasn't it?

A. As far as I'm concerned, yes, but I didn't write all the contracts.

Q. You're in charge of the office? [29]

A. I'm in charge of the office.

Q. The office is a rather open expanse, a counter about twenty feet long in a straight line with complete access of any man behind the counter up and down? A. Right.

Mr. Robinson: Your Honor, I can put on other testimony to the fact that the form was no part of

(Testimony of John Chinn.)

the contract, was never shown or given to the man, became no——

The Court: We're just concerned now with its admissibility on the evidence so far presented, aren't we?

Mr. Robinson: That's right. Object to the introduction on the ground it was no true part of the contract. If it were private individuals it would certainly be susceptible to fraud, with reference to the provisions in the form. I don't know whether your Honor has seen the form or not. It doesn't have any connection with the order form. The order form is the purchase contract. It states in the announcement that the potatoes would be—the contract would be completed when they passed to the purchaser, when he takes delivery of them, rather.

The Court: If I want more argument I'll mention it.

Mr. Robinson: Oh.

The Court: I'll ask the jury to step out for just a few minutes, please.

(Whereupon, the following proceedings were had without the [30] presence of the jury.)

The Court: I thought we'd better discuss and pass upon this point in the absence of the jury, because from hastily glancing over this contract or order form, which I have seen for the first time today, I can find no provision in there as to reservation of title, and I assume that the reservation of title is rather an important element in this case.

Mr. Erickson: Yes, it is.

(Testimony of John Chinn.)

The Court: And for that you're depending upon your identification 5?

Mr. Erickson: Yes.

The Court: Are you offering that on the theory that it's a part of the contract, or that it's a regulation that has the force of law?

Mr. Erickson: Both, that it's a part of the contract, and a regulation that has the force of law.

Mr. Robinson: Your Honor, there's no authority on the part of the Commodity Credit Corporation to make regulations such as there was in the O.P.A. and other war activities. The statute, I have the laws of the 80th Congress, sets this up on an entirely different basis, as might be understood from our friends in the 80th Congress. With reference to the Commodity Credit Corporation the whole theory was an intent, apparently, on the part of the [31] 80th Congress when it passed the Commodity Credit Corporation Act to drastically limit some of these broad administrative regulations and authority that had been given. As a result, the Commodity Credit Corporation charter act as approved June 29, apparently just before the end of it, has no provision for any administrative regulations of any kind whatsoever except for the operation of the corporation itself, the board of directors and the executive staff. We therefore would strongly press that there was no valid basis whatsoever for any contention. nor any shown here, that that is issued pursuant to any administrative authority or regulation. Now, on the other point——

The Court: It would seem to me, of course I'm

(Testimony of John Chinn.)

just expressing a tentative view here, but it would seem to me that to be a part of the contract and to be embraced within the agreement of the farmer who was purchasing the potatoes for feed purposes and the corporation, it would have to either be attached or be read by him, or be called to his attention, and that hasn't been shown, it doesn't seem to me that under the proof so far you could say that something merely laid out on the desk, that he could have read if he had seen fit, is a part of the contract he signs. I don't see how that could be possible, so on that I'll hear from the United States Attorney further. If this is a regulation [32] on which the court could take judicial notice, it would have some effect here.

Mr. Robinson: We don't contend there isn't a warranty; it's the reservation of the title clause only.

The Court: Yes, I understood that, but this plaintiff's identification 4, as I understand it, contains no reservation of title.

Mr. Robinson: No, it does not.

The Court: If we had exhibit 4 here alone to deal with, it would seem to me the title would pass to the purchaser upon payment and delivery.

Mr. Erickson: May it please the court, paragraph 2 from Exhibit 4, "Potatoes for livestock feed will be sold subject to the terms and conditions set forth in form FV 111, and at the following prices".

The Court: Oh, yes.

Mr. Erickson: That's signed by Williamson; he read that. Then down below, in the paragraph immediately above his signature, it says, "I/we have read the terms and conditions of this sale as set

(Testimony of John Chinn.)

forth herein and in Form 111, terms and conditions of sale of fresh Irish potatoes for livestock feed, and agree fully to abide by such terms and conditions." He states he has read it; Mr. Chinn says they're available on the desk, but he just doesn't read it to each and every person who comes in to the counter there, [33] and I want to submit that although this document is not complete in itself, it incorporates by reference another document which the signer of that document states he has read, and signs over his signature that he's read it and knows the provisions, and I submit that it then becomes a part of the contract.

Mr. Robinson: Your Honor, in the first place, the statement that potatoes will be sold subject to terms and conditions is a part of an announcement or advertisement in the Form FV 911, of the announcement form; that has no part of the contract whatsoever. The statement with reference to "I have read the terms and conditions of this sale" that is the reason I went into what would otherwise be proper on cross-examination with reference to Mr. Chinn, in which Mr. Chinn pointed out that of the great many, hundreds if not thousands of persons with whom he dealt, that the part of Form FV 111, this matter, which is the only thing upon which the government can hang its hat, for title, was not set out to them, a copy of the contract was sent back to these people eventually, in the case of Williamson you can see it was a month later, or more, but there was absolutely nothing sent back to them or anything explained to them with reference to title. No doubt

(Testimony of John Chinn.)

it was explained to them that they had to be livestock feeders; we raise no question about a warranty or [34] agreement that it be used for livestock feed. There is nothing tying these two papers together, in a normal case, if they had attached this together, and the grower said, "I have read this, set forth herein, copy attached," but here is a deliberate, unfortunate, because of the case Mr. Chinn was very rushed, he had potatoes up to his ears, there was simply nothing done; on the other hand, a denial of the very processes here, that he says he has read the terms and conditions, so that the grower did not know; he knew that he warranted the potatoes would be used, but he had no way to know this reservation of title hidden in another paper, of which the first paragraph is entitled "terms and conditions" and a lot of fine print there on a mimeographed form, and I contend it is not admissible for that reason.

The Court: I think that's an argument that you might use as to the weight to be given to this document, and in case there's a conflict, you could argue the conflict, but here, when Mr. Williamson certifies over his signature that he's read this document, FV 111, I think that's prime facie evidence that he has read it, and it's enough to make the document admissible in evidence. I'll overrule the objection, allow the defendant an exception, and admit identification 5.

Mr. Robinson: Your Honor doesn't want to hear Mr. [35] Williamson on that point?

The Court: No, I think the government has shown enough to show it's admissible, and if there's a con-

(Testimony of John Chinn.)

flict in the testimony as to its effect, or whether he had notice, or how much notice he had of it, that's for the jury to determine.

(Whereupon, Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 5 is set out in full at page 310 of this printed Record.]

The Court: I don't think we have a different situation than if proof is offered that A signs a document; that makes a document admissible. I'm not going to stop and have A testify he didn't sign it, and have handwriting experts and go through the whole business of whether it's a genuine signature. It's admissible, and then it's a matter of weight of evidence.

Mr. Robinson: I meant it was a studied procedure on the part of the government; there wasn't any activity taken in regard to it; if it would otherwise appear in the evidence, we could show that the grower didn't see it, that's the reason I meant I thought it wasn't admissible.

The Court: Well, I think the witness testified he discussed the clause with several growers; he doesn't know whether the growers read it or not; he said it was there and it was out before them; he can't say they did or didn't; I think you might infer that most of them didn't, [36] but I think in view of the fact there's a certification here, that would make it admissible. Bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

(Testimony of John Chinn.)

(Whereupon, Mr. Erickson read plaintiff's Exhibit 4 and the first two paragraphs of plaintiff's Exhibit 5 to the jury.)

(Whereupon, certificate of inspection was marked Plaintiff's Exhibit No. 6 for identification.)

(Whereupon, voucher was marked Plaintiff's Exhibit No. 7 for identification.)

Direct Examination—(Continued)

By Mr. Erickson:

Q. Mr. Chinn, I'll hand you plaintiff's identification 6 and ask you to state what that is.

A. This is a certificate of inspection, giving the grades and disposition of lot.

Q. Is that certificate a part of the records and files of your office? A. It is.

Q. And what is the procedure in obtaining an inspection certificate?

A. After obtaining the inspection certificate a voucher is made from the inspection certificate to pay the man for whose potatoes we buy. [37]

Q. And is the license number of the truck mentioned on the certificate? A. It is.

Q. On which the potatoes are loaded. I'll hand you plaintiff's identification 7 and ask you what that is, Mr. Chinn.

A. This is a public voucher made out to H. H. Simmons and Sons for fresh Irish potatoes.

Q. Are those for the same potatoes mentioned in plaintiff's identification 6, or not? A. Yes.

(Testimony of John Chinn.)

Q. This voucher, plaintiff's 7, is made payable to H. H. Simmons and Sons? A. Yes.

Mr. Erickson: I'll offer 6 and 7 together.

(Whereupon, certificate of inspection was marked Plaintiff's Exhibit No. 8 for identification.)

(Whereupon, voucher was marked Plaintiff's Exhibit No. 9 for identification.)

Voir Dire Examination

By Mr. Robinson:

Q. Mr. Chinn, the procedure in making out the voucher was, after you received the inspection certificate from the Horticulture Inspector the voucher was made out? A. Yes, sir. [38]

Q. Your office made the voucher out?

A. Yes.

Q. You had nothing to do with making the inspection certificate? A. That's right.

Q. You just received that from the horticultural inspector, is that right? A. That's right.

Q. You don't have any personal knowledge about the inspection certificate, do you? A. No.

Further Direct Examination

By Mr. Erickson:

Q. Let me ask one more question: Are they part of the official files of your office? A. They are.

Q. And under your custody.

Mr. Robinson: There's an error in one of them; I want to bring it out later on, I think.

The Court: All right.

(Testimony of John Chinn.)

Mr. Robinson: It's not intentional on anyone's part; no objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibits Nos. 6 and 7 for identification were admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 6 is set out in full at page 314 of this printed Record.]

[Printer's Note: Plaintiff's Exhibit No. 7 is set out in full at page 316 of this printed Record.]

Q. (By Mr. Erickson): Now, referring you to plaintiff's Exhibits [39] 6 and 7, you may have them to refresh your recollection, what do they indicate about the purchase and payment of potatoes from C. F. Williamson, if anything?

A. It shows that we purchased 445 100-pound sacks of U. S. No. 1 potatoes, and that the vouchers was made out to H. H. Simmons and Sons, who is an elibigle dealer. We don't know whose potatoes they were.

Q. Does it show where the potatoes came from, the inspection certificate?

A. It shows where they're to go to.

Q. Where they're to be delivered to?

A. That's right.

Mr. Robinson: We'll stipulate that they came from Williamson, rather than worry about it. It doesn't show on there where the potatoes came from that are paid there, but we know that many sacks came in.

Mr. Erickson: Very well.

(Testimony of John Chinn.)

The Court: All right.

Q. (By Mr. Erickson): And I'll hand you plaintiff's exhibit for identification number 8, and ask you to state what that is?

A. It's an inspection certificate for 200 sacks of U. S. No. 1, and 59 sacks of U. S. No. 2.

Q. And is that part of the official records——

A. No, that's all No. 1, I guess. The 59 was in used sacks.

Q. Is that part of the official records and files of your [40] office? A. That is.

Q. Signed by one of your inspectors?

A. Signed by one of the inspectors.

Q. I'll hand you plaintiff's identification 9, and ask you to state what that is?

A. This is the voucher showing that we paid for 200 sacks of U. S. No. 1 and 59 sacks of U. S. No. 2, Pasco Growers.

Q. Does plaintiff's 9 show payment for the same potatoes mentioned in identification 8?

A. Yes.

Mr. Erickson: I offer 8 and 9.

Mr. Robinson: No objection.

The Court: They will be admitted.

(Whereupon, Plaintiff's Exhibits Nos. 8 and 9 for identification were admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 8 is set out in full at page 318 of this printed Record.]

[Printer's Note: Plaintiff's Exhibit No. 9 is set out in full at page 320 of this printed Record.]

(Testimony of John Chinn.)

(Whereupon, consignee receipt for 445 sacks potatoes was marked Plaintiff's Exhibit No. 10 for identification.)

(Whereupon, consignee receipt for 200 sacks potatoes was marked Plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. Erickson): I'll hand you plaintiff's identification 10 and ask you to state what that is, Mr. Chinn?

A. This is the consignee receipt signed by C. F. Williamson for 445 sacks of U. S. No. 1 potatoes.

Q. I'll offer 10; and I'll hand you plaintiff's identification 11 and ask you to state what that is?

A. This is also a consignee receipt showing 200 100-pound sacks of fresh Irish potatoes received by C. F. Williamson.

Q. And it gives the date of the receipt?

A. The date isn't on there.

Q. Are these 10 and 11 part of the official records and files of the Department of Agriculture here?

A. They are.

Q. And in your custody here in Yakima?

A. They are.

Mr. Erickson: I offer 10 and 11.

Mr. Robinson: No objection.

The Court: All right, they will be admitted.

(Whereupon, Plaintiff's Exhibits Nos. 10 and 11 for identification were admitted in evidence.)

(Testimony of John Chinn.)

[Printer's Note: Plaintiff's Exhibit No. 10 is set out in full at page 323 of this printed Record.]

[Printer's Note: Plaintiff's Exhibit No. 11 is set out in full at page 324 of this printed Record.]

Q. Now, I'll hand you exhibit 10 and plaintiff's exhibit 7 and ask you to state whether or not those are the same potatoes, the 445 sacks?

A. Yes, they are.

Q. So that the plaintiff's exhibit 7 is the purchase voucher for the potatoes mentioned in plaintiff's Exhibit 10 which Mr. Williamson acknowledges receipt for, is that correct? A. Right.

Q. I'll refer you to Plaintiff's Exhibit 11 and Plaintiff's [42] Exhibit 6, and ask you if those are the same potatoes—let's see what one that is. I hand you Plaintiff's Exhibit 9, and ask you if those are the same potatoes covered by Plaintiff's Exhibit 11?

A. Yes, they are.

Q. And 9 is a purchase voucher for potatoes covered in 11? A. Yes.

(Whereupon, contract for livestock feed, Waller, was marked Plaintiff's Exhibit No. 12 for identification.)

(Whereupon, terms and conditions of sale was marked Plaintiff's Exhibit No. 13 for identification.)

Q. I'll hand you Plaintiff's Exhibit 12 for identification, and ask you what that is?

A. It's a contract for livestock feed.

Q. Signed by whom?

(Testimony of John Chinn.)

A. Signed by Melvin E. Waller.

Q. I'll hand you plaintiff's identification 13, and ask you to state what that is?

A. It's the terms and conditions of sale of Irish potatoes for cattle feed.

Q. Do you have any independent recollection of the signing of this contract? A. No, I don't.

Q. Is this contract part of the records and files of your [43] office? A. It is.

Q. And under your custody at this time.

The Court: Who is that contract between?

Mr. Erickson: Melvin Waller, and the United States Department of Agriculture, dated August 25, 1948.

The Court: All right.

Mr. Erickson: I offer 12 and 13.

Mr. Robinson: Your Honor, these are—I object to them as entirely irrelevant. The dates shown are August 25; it's a purchase form, the same one Mr. Williamson signed, and I think it's Exhibit 4, the purchase dates are August 25 and September 23, 1948, indicating, I think, rather clearly——

The Court: Subsequent to the date of the indictment?

Mr. Robinson: Yes, two days after for one of them, and a month after for the other, and the guilty knowledge must have been shown, if they can show it at all, certainly at the time that any taking was involved, and by their own statement the potatoes were in Portland before this ever occurred.

Mr. Erickson: I will withdraw the offer for these two now. I think it can be tied in later.

(Testimony of John Chinn.)

The Court: All right; you can withdraw the offer and leave them in identification here. [44]

Mr. Erickson: Yes. That's all; you may examine.

Cross-Examination

By Mr. Robinson:

Q. Mr. Chinn, you haven't brought over all the records from your office, have you?

A. Pardon?

Q. You haven't brought over all the records from your office? A. No.

Q. You have a lot more records over there, isn't that correct? A. Yes.

Q. Do you have other records of deliveries of potatoes made to Charley Williamson, potatoes that he had bought from the government?

A. I have.

Q. You have quite a few with regard to this same period of time, haven't you? A. Yes.

Q. How many potatoes did Mr. Williamson contract to purchase from the government and buy from the government for stock feed?

A. Through the entire year?

Q. 1948. A. I couldn't tell you exactly.

Q. Can you tell me from Plaintiff's Exhibit 4 how many he bought on August 19, 1948?

A. No, I can't. [45]

Q. Why not?

A. Well, he didn't buy them all one day; I don't know what day he did, but they're delivered through a period of time.

Q. Can you tell me how many he contracted to purchase on August 19, 1948?

(Testimony of John Chinn.)

A. Whatever is on that contract, 11,000 hundred-weight.

Q. How many ton?

A. That would be 22, I guess.

Q. It would be 500 ton, wouldn't it, 550 ton?

A. Yes.

Q. 550 ton is the number that Mr. Williamson contracted to purchase for stock, is that right?

A. Yes.

Q. Far as you know he paid for that number, didn't he?

A. Yes.

Q. You gave him authorization to take delivery of that number, did you not?

A. I did.

Q. So far as you know, why, he took delivery of that number, isn't that correct?

A. I have records to show how many he took and how many he didn't; sometimes those contracts were under delivery and sometimes——

Q. Sometimes they were over-delivered?

A. Yes. [46]

Q. If they were over-delivered you went around and tried to collect from the purchaser, isn't that right?

A. That's right.

Q. You have in your office, then, a considerable number of records of other deliveries that Mr. Williamson had made and purchased, didn't you?

A. That's right.

Q. You have records of other deliveries of potatoes purchased at about August 23, 24, 25, and around that period, haven't you?

A. Yes, sir.

Q. Exhibits 6 to 12, then, don't purport to be all of your records pertaining to purchases at about that time, do they?

A. No.

(Testimony of John Chinn.)

Q. I think you said that was a very busy time for your office and for the horticultural folks also, wasn't it? A. It was.

Q. You were both very much rushed; after potatoes were delivered at a sorting house as far away as Sunnyvale, it would take several days for you to get the horticultural inspection certificates such as inspection certificate number 6, wouldn't it?

A. It usually took about two to three days.

Q. Two or three days until you got the inspection certificate; [47] then I presume it's correct, isn't it, that you put it through a processing in your office, isn't that correct? A. Yes.

Q. At the same time you had the inspection certificate did you always get consignee's receipt. Exhibit 11?

A. The consignee's receipt must accompany the voucher and the inspection certificate before payment could be made.

Q. Did it have to accompany the inspection certificate at the time that you got it? A. No.

Q. But it had to be in your office until payment was made, is that correct?

A. Consignee vouchers were held up until a consignee's receipt was signed.

Q. You didn't issue any voucher until you had the inspection certificate and the receipt showing he had not only paid for the potatoes, but had received them. Did you use this same procedure when a stock feeder who wasn't a producer of potatoes came in?

A. Yes.

Q. You didn't issue him any voucher, did you?

A. Of course not.

(Testimony of John Chinn.)

Q. You didn't use the voucher form as far as the stock feeder was concerned?

A. The voucher is to pay the eligible dealer. [48]

Q. It had no connection with the people who were purchasing potatoes at all, did it?

A. The voucher?

Q. Yes. A. No.

Q. I think you said you have no personal knowledge about the execution of the consignee's receipt, the inspection certificate, or the voucher, isn't that right?

A. That's right.

Q. The voucher was the only thing made up in your office?

A. That's right, and the consignee's receipt.

Q. The consignee's receipt was made up in your office?

A. It's taken off the voucher, and it shows the disposition of those potatoes.

Q. Were similar consignee's receipts to plaintiff's exhibit 11 made up in your office?

A. Yes.

Q. That is, the information that's on them was filled in?

A. It's all filled in.

Q. In your office? A. Yes.

Q. After you received the inspection certificate?

A. It's taken from the inspection certificate.

Q. From the inspection certificate; then it was always several days from the time that potatoes were delivered to a purchaser [49] before he ever signed a receipt for them, isn't that correct?

A. In some cases.

(Testimony of John Chinn.)

Q. Well, in the cases of deliveries at Sunnyside to purchasers for livestock feeding it was always several days from the time the deliveries were made before the consignee's receipt was ever signed, isn't that correct?

A. I wouldn't want to say how many days.

Q. But it was always several days?

A. No, I don't think it was.

Q. It was always enough time for the horticulture inspection certificate to come to your office and for you to prepare the consignee's receipt and to get it signed, wasn't it?

A. No.

Q. Why not?

A. In some cases they signed consignee receipts before the potatoes were delivered, in order to receive their money.

Q. They signed the consignee's receipts in blank very often, didn't they?

A. In some cases.

Q. That's the way Mr. Williamson signed his, wasn't it?

A. I don't know.

Q. Wasn't that the customary procedure, so there wouldn't be this delay we're referring to?

A. No, it wasn't the customary procedure, but some cases it [50] was done that way.

Q. No objection by the government, was there?

A. Not that I know of.

Q. Or by you. How long have you been working with this subsidy program for potatoes, Mr. Chinn?

A. This is the first year.

Q. Last year was the first year. The essence of

(Testimony of John Chinn.)

the program was that you purchased for the Commodity Credit Corporation, purchase the potatoes from persons under the potato subsidy program, isn't that right? A. That's right.

Q. That was the essence of it, and then, having a lot of potatoes on hand, you disposed of them to certain processors and for livestock feeding?

A. That's right.

Q. There was no necessary connection between the two, the purchase by the government and the sale out to livestock feeders and processors, was there?

A. I had my orders on disposition each day, as to where these potatoes should go.

Q. Answer the question, Mr. Chinn. Would you read it?

(Whereupon, the reporter read the last previous question.)

The Court: I'm not sure that's clear. It isn't too clear to me whether you mean a specific instance, or the [51] whole program.

Q. Yes; I mean the part of the—that you didn't have to—that your sale transaction for processing and livestock didn't have any exact or close connection with your purchase of the potatoes from the growers who were under the subsidy program?

A. We had to have a disposition of those potatoes.

Q. Had to get rid of them when you got them in; that's right. A. That's right.

(Testimony of John Chinn.)

Q. If a grower sold potatoes to the government, and a livestock feeder who didn't raise potatoes came in, you'd sell them to him, isn't that the way you worked it out?

A. Yes, whenever we had certain contracts filled.

Q. Wasn't it, as a part of this program, weren't orders given down from your higher channels to dye potatoes that were sold for livestock feed, dye them a different color? A. Yes.

Q. You didn't see that any of those orders were carried out, did you?

Mr. Erickson: Now, to which we object as outside of the scope of direct examination.

The Court: I'll overrule the objection.

A. Yes, we dyed some potatoes.

Q. When? A. This past summer. [52]

Q. At the beginning of the program, or at the end of it? A. Towards the end of it.

Q. Not before September 1, did you?

A. I think not.

Q. You didn't even have any dye, did you?

A. Yes, we did.

Q. Before that time?

A. I don't know if we had the dye; we had everything else; I think we had the dye; it came in, but I don't know what date.

Q. You don't know that any of the potatoes that Williamson purchased during the month of August for livestock feed were ever dyed, do you?

A. They were not dyed.

(Testimony of John Chinn.)

Q. They were not; that's all.

The Court: Any redirect?

Redirect Examination

By Mr. Erickson:

Q. Mr. Chinn, in regard to that last question, you say that the potatoes purchased by Mr. Williamson were not dyed, but state whether or not Williamson purchased any potatoes for any other purpose than livestock feed?

A. I think all the potatoes that Mr. Williamson bought were for livestock feed.

Q. They all went for livestock feed; where did you get your orders for the disposition of potatoes? [53]

A. Through the inspection service.

Q. The which? A. Inspection service.

Q. Did you get those orders daily?

A. Yes.

Q. And when you got the orders what did you do with the orders that you got?

A. The inspection service notified us by 'phone every night as to how many potatoes were being loaded by certain warehouses, if you're talking about eligible dealers, and we notified Commodity Credit each night of how many potatoes we bought, as well as the State office.

Q. State whether or not you in turn transmitted orders to the eligible warehouses as to what to do with the potatoes? A. That's right.

Mr. Erickson: That's all.

(Testimony of John Chinn.)

Recross-Examination

By Mr. Robinson:

Q. These eligible dealers and warehouses, were they the agents of the Commodity Credit Corporation to handle these potatoes you bought?

A. They made a contract with Commodity Credit to handle eligible growers.

Q. They were paid a certain fee by the government according to a certain schedule for all the actions they handled, of sorting and so on? [54]

A. That's right, they acted as an agent of the government in handling these cases.

Q. How do you know that Mr. Williamson didn't purchase any except for livestock feed?

A. He didn't purchase any from us for livestock feed—outside of for——

Q. Excuse me?

A. He didn't buy any government potatoes for anything but livestock feed.

Q. You didn't restrict the hauling away by a grower of culls or lower grade potatoes that he put through one of these eligible dealers, did you?

A. No.

Q. In other words, they belonged to the grower, and you never bought them and never sold them back.

A. They were never reported to us.

Q. That was a transaction between the dealer and the grower who took them in?

A. I suppose so.

Q. He hauled them away as he saw fit. That's all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.) [55]

JOHN B. KERBY,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. John Blue Kerby.

Q. And what is your present occupation?

A. I'm a school teacher.

Q. At Toppenish? A. Yes, sir.

Q. During the last summer season what was your occupation then?

A. I was employed by the state horticultural department in the position of inspecting potatoes.

Q. And that was during August of 1948?

A. July and August was the time I was employed, sir.

Q. Well, Mr. Kerby, I'll hand you plaintiff's exhibit 8, and ask you to state whether or not that's your signature appearing on there?

A. Yes, that is my signature.

Q. And did you make that inspection certificate?

A. Yes, I made the inspection of the potatoes as they were sorted and loaded onto the truck.

(Testimony of John B. Kerby.)

Q. And what day was that inspection made?

A. Well, it was August 24, 1948.

Q. And just tell how you made this inspection and what your [56] duties were.

A. Well, that is the time I was working at Majonnier's.

Q. That's the same as Pasco Growers?

A. Yes; on commercial brands, on potatoes being sold under commercial set-up without support, they went out as Majonnier's, and on support potatoes they went out as Pasco Growers.

Q. What did you do?

A. At the warehouses the potatoes were run over the belts for inspection by the employees there. My duties were to extract at least one sack out of every thirty-five or fifty and inspect them as to quality and grade, and whether they met the specifications of the government, and after the potatoes were sacked and stacked in a given area on the floor of the warehouse I made a note of the number and where they were, and those that were under this program had to be counted onto the truck and the amount of the load certified, and also the license number of the truck on which the potatoes were loaded.

Q. Refreshing your recollection from that certificate, how many did you count out, the number stated?

A. Well, I believe it to be so, or I would not have stated it.

(Testimony of John B. Kerby.)

Q. Well, what truck were these potatoes placed on?

A. Well, there were two truck, the license numbers of which I certified, TKE7015 and TKE10173.

Q. How many were placed on each truck?

A. One truck 201, and the other 208 and 51 sacks; the 208 truck was a large flat bed, I believe it was either a very large flat bed, or a truck tractor with a flat bed trailer and the other was a small load on a small older truck; I don't know which license number fit which truck, but I do know there were two different ones.

Q. And were these number 1 potatoes?

A. I believe they were all number 1 potatoes, yes.

Q. And state whether or not they were stock food potatoes?

Mr. Robinson: I object to that as calling for a conclusion of the witness.

The Court: Well, I think he's answered the question that they were number 1.

A. Yes, I certified them and inspected them sufficient to know they were all number 1 potatoes.

The Court: Sustain the objection.

Q. And these potatoes were loaded into the truck for what purpose, if you know?

A. On the certification that was being carried on at the time under this program to stock feeders, and when I certified the loading of the trucks and it was on the trucks I had to find out from the driver where they were being sent and for what

(Testimony of John B. Kerby.)

purpose. The truck driver stated the loads were being delivered to C. F. Williamson, Sunnyside, Washington, [58] at his feed lot.

Mr. Erickson: That's all; you may examine.

Cross-Examination

By Mr. Robinson:

Q. Let me see the exhibit; I didn't hear everything that was said. With reference to plaintiff's exhibit 8, it shows two truck loads, is that correct?

A. Yes, sir.

Q. That is 200 sacks on one truck, and 59 on the other?

A. 208 on one truck, I believe, and 51 on the other.

Q. Well, I don't mean to trap you; showing you the exhibit, 200 on one and 59 on the other, is that right?

A. Yes, apparently there is that, 208 and 51 are 259; now, why there should be a slight discrepancy there, unless there was an error in my part, I know the total number counted out on the floor and the total number on the two trucks; as to the split, I apparently did make an error in splitting the size of the loads.

Q. Under the word "Products" you split them 200 on one truck and 59 on the other, and the other 208 on one truck and 51 on the other?

A. Oh, yes, I see, I thought you were pointing out a discrepancy there; there's 200 used number 1 100-pound sacks, marked Blue Mountain, and 59 number 2; however, on the one truck there were

(Testimony of John B. Kerby.)

apparently 208 sacks, 200 sacks of number 1 and 8 sacks number 2. [59]

Q. What the trucks had on them were 208 on one and 51 on the other?

A. Yes; however, there was the 20 Number 1's.

Q. Do you have any personal recollection of this transaction?

A. In thinking back over it, I do, in the sense that there was a number of trucks being loaded out at the time I was inspecting the loading of railroad cars, and it meant oftentimes I had to work all during my lunch hour, when I was supposed to have lunch, to keep up with everything which I did this day, and that's the only reason I mentioned it.

Q. This shows the loading 12:30 p.m.; is that the time it was completed? A. Yes.

Q. I assume you had your lunch after this time?

A. Yes.

Q. Did you do the typing?

A. No, I sent them out on the form you see them, in longhand, and they're typed in the office, and I re-check them and certify it to be a fact.

Q. You didn't keep any copy of the memo you sent in to the office, did you?

A. No, but I believe the office itself checked the final form with the original longhand.

Q. Where is the office that you refer to? [60]

A. The office would be at Grandview, I believe.

Q. Did you send these in at the close of the day?

(Testimony of John B. Kerby.)

A. Well, yes, they usually went in in the afternoon and they were brought back the next morning for signing and forwarding to the various places that the duplicate copies would be sent.

Q. You handled approximately how many trucks on the usual day?

A. One day there was a large number of trucks going to one shipment in Toppenish, and it took all the potatoes that they were running at the warehouse at that time, to some man in Toppenish, and there must have been a dozen trucks that day. However, on the average day we were running the large percentage into the freight cars, and then there would be only two or four trucks at the most.

Q. John ran most of his onto trucks?

A. Well, it depends on the grower. Some were going out on the iced cars to the Eastern market.

Q. Those were non-support potatoes?

A. Probably, at that time. The rest were shipped to some processing plant for processing under the support program.

Q. How many days did you work last summer on this, Mr. Kerby?

A. From the first of July until the last day of August, or rather the 28th or 29th, just a day or so before school started. [61]

Q. Did you work all your time at Majonnier's?

A. No. When I first started I spent two weeks here in Yakima training in the policy and the rules and regulations of inspecting potatoes.

(Testimony of John B. Kerby.)

Q. How much time did you spend at Majonnier's around the period of August 24?

A. At least a month.

Q. In other words, practically the whole month of August?

A. Practically the whole month; I believe it was the first few days of August or the latter part of the first week when I went down there.

Q. Did you spend any time at any other sorting house?

A. Well, the first week was spent with another fellow re-inspecting some potatoes.

Q. Did you after August 15 spend any time in any other sorting house besides Majonnier's, or Pasco Growers?

A. Yes. There was one other house I went over to check a few potatoes in a car across the tracks from where I was working with Majonnier's.

Q. Do you recall when that was?

A. I couldn't recall the day or the time; I know I inspected them for just a matter of a few sacks before they sealed them overnight, and that was a matter of assisting out on a rush program.

Q. What do U. S. No. 1 potatoes look like? [62]

A. Well, a U. S. No. 1, depending on the type one is inspecting, those are the White Rose, six ounces or larger, smooth, even surfaced, conformity to type, and free of blemishes within certain limitations.

Q. They're pretty fine looking potatoes, aren't they?

A. They should be.

(Testimony of John B. Kerby.)

Q. A minimum of $1\frac{7}{8}$ inches in diameter, is that correct? A. On these they ran that, yes.

Q. You have no personal knowledge of the trucks that were doing this hauling?

A. Only as I looked them over, I had to check each one for its license number and make sure that the license number that I wrote down was the one on the trucks and trailers, and find out where they went, is the only personal contact I had with the truck.

Q. Is one of the trucks referred to on government's exhibit 8 a small truck?

A. I think it was rather dilapidated, there was just a bed fastened on the back, rather ancient vintage, but I suppose it would be two, two and a half tons.

Q. A farm truck?

A. Yes, local small truck.

Q. The other a farm truck also?

A. No, the other was a large truck you see on the highways, long distance hauling, what I'd think about it. [63]

Q. Was it a truck, or a trailer?

A. I believe it was a truck and semi-trailer.

Q. Not quite sure about that?

A. I know it was a large flat bed, and I would say it was a truck and semi-trailer.

Q. You always were careful to put the numbers of the license down?

A. Yes; now, a few trucks that came in were minus a license on the truck or trailer, and occa-

(Testimony of John B. Kerby.)

sionally there was a question about that, and if they couldn't find the one, I'd get the license off the tractor part or trailer part, whichever was there; apparently the state wasn't too careful in checking the trucks that the licenses were present.

Q. You don't know the name of the owner of the farm truck? A. No, not that one.

Q. That wasn't any part of your concern?

A. No, not who owned it or who was driving it; mainly who the potatoes were being delivered to.

Q. Do you know the name of the owner of the other truck?

A. I believe it was the Herrett Trucking firm.

Q. You cleared a number of shipments hauled out by the Herrett Trucking Company for William-son, did you not?

A. I believe I did, yes.

Q. You can't be positive that on August 24 a truck involved there was the Herrett Trucking Company, out of all those [64] shipments, can you?

A. Well, yes, I could say it was.

Mr. Robinson: That's all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

(Short recess.)

(All parties present as before, and the trial was resumed.)

JOHN CATLIN,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. John Catlin.

Q. And your residence?

A. Ellensburg, Washington.

Q. What is your employment?

A. Department of Agriculture, Horticultural Inspector.

Q. During the month of August, 1948, where were you stationed then?

A. Sunnyside, Washington.

Q. I'll hand you plaintiff's exhibit No. 6 and ask you if that's your signature that appears on the bottom of that certificate?

A. That's right. [65]

Q. Will you tell us how you made that certificate?

A. I don't quite get what you mean.

Q. How was the information on that certificate compiled by you?

A. Well, when this truck came up to Simmons' warehouse he parked in front of the warehouse, and when they started loading I started my inspection, when my inspection started, that's the time of day showing on this certificate here, at the time the truck was started to load, and the

(Testimony of John Catlin.)

inspection continued until the truck was completely loaded and counted and departed.

Q. And what did your inspection consist of?

A. The grade of potatoes, the trucking company, the truck license, and who the applicant was, the shipper, the warehouse where I was working, and the destination of the potatoes.

Q. And what did you ascertain the destination of those potatoes to be?

A. Well, the applicant stated they was to be delivered to C. F. Williamson.

Q. Where?

A. Sunnyside, Washington.

Q. At what particular place?

A. No place other than the feed lot; there was no other designation there. [66]

Q. And how many sacks is covered by that report? A. 445.

Q. How many trucks involved?

A. Two trucks.

Q. What kind of trucks were they?

A. One was a semi-trailer flat bed, pulled by Herrett Trucking Company, and the other was a solo farm truck.

Q. Do you have the license numbers of the flat bed or semi?

A. TLE 1190, and the farm truck was TKE 10170.

Q. And how many sacks?

A. 315 on the flat bed, and 130 on the solo.

Q. Were both trucks destined for the C. F.

(Testimony of John Catlin.)

Williamson feed lot? A. Yes.

Q. What grade of potatoes were on those trucks?

A. U. S. No. 1.

Q. And what warehouse did they come from?

A. They came from H. H. Simmons & Sons warehouse.

Q. And what kind of sacks were they in?

A. They were in Paramount brand used sacks; Simmons sacks.

Q. And what was the date?

A. That was August 23, 1948.

Q. Does it give the time?

A. Started at 8:45 a.m., completed at 6 p.m.

Mr. Erickson: That's all; you may examine. [67]

Cross-Examination

By Mr. Robinson:

Q. The 6 p.m. to which you now refer was the time when both trucks were finished loading?

A. Yes, I believe that's right.

Q. The time that appeared on these inspection certificates was the closing time that your connection with the truck load shown on here was terminated? A. Yes.

Q. Do you have any independent recollection about the trucks separately loading, which one loaded first?

A. The flat bed loaded first.

Q. That's the one with the 315 sacks?

A. Yes.

Q. 315 sacks the way they were loaded out there is how many tons?

(Testimony of John Catlin.)

A. Fifteen and three-quarters.

Q. Fifteen and three-quarters ton of potatoes was put on the flat bed truck?

A. That's right.

Q. How high were they stacked, do you remember?

A. I believe they were four or five high, but I wouldn't be positive of that; I don't recall.

Q. When you say a flat bed truck you mean one on which there were no side boards?

A. That's right. [68]

Q. Or supports at all? A. That's right.

Q. A tarpaulin and ropes were used to keep them from falling off on the sides, weren't they?

A. On this case, yes.

Q. Yes, on the flat bed truck? A. Yes.

Q. Do you remember when the flat bed truck moved away from the Simmons warehouse?

A. Not exactly, no; somewhere around between 4 and 5, but I couldn't say for sure when.

Q. And then the farm truck was loaded later on? A. That's right.

Q. Was it left standing at the Simmons warehouse until a later time in the evening, do you recall?

A. It must have been completed by 6 o'clock, because that's the time the inspection on the certificate was completed, and we don't complete the certificate until the truck is fully loaded and counted.

Q. Yes, but you do complete the certificate be-

(Testimony of John Catlin.)

fore it moves away, sometimes, don't you, from the warehouse?

A. Oh, yes, you complete your time.

Q. You're not concerned about when it actually drives off? A. No.

Q. You're concerned with when it loads? [69]

A. That's right.

Q. Did your duty day close at 6 p.m.?

A. No.

Q. When did it close on a day such as August 23, 1948?

A. Anywhere between 9 and 10:30 in the evening.

Q. Do you have any recollection about what time you ceased work on this day?

A. No, I don't.

Q. Do you recall the name of the driver who was operating the Herrett Trucking Company truck?

A. We don't get the driver's name.

Q. Were you employed at Simmons' for the rest of the month of August? A. Yes.

Q. Do you recall any truck from Herrett Trucking Company coming down to Simmons' on the succeeding day or any later days?

A. No, I don't.

Q. Is this the only truck of the Herrett Trucking Company that you ever saw down at Simmons' warehouse? A. As far as I know.

Q. You didn't work at any other warehouse, just the one? A. No, just Simmons'.

(Testimony of John Catlin.)

Q. Were there any other inspectors working at Simmons'? A. No. [70]

Q. You handled the whole thing by yourself there? A. Yes.

Q. Did you say you didn't recall when the farm truck was driven away, what time in the evening it was driven away? A. That's right.

Q. You said you didn't recall?

A. I didn't recall.

Q. All the potatoes on these two truck loads were number 1 potatoes, I think you said?

A. That's right.

Q. You say the applicant stated that they were going to a farm lot or feeding lot; whom do you mean by the applicant?

A. That's H. H. Simmons & Sons.

Q. So H. H. Simmons stated that?

A. That's right.

Q. You got that information from Simmons that you put on the inspection certificate?

A. That's right.

Q. The inspection certificates, Mr. Catlin, are actually not typed out by you, isn't that correct?

A. No, we write them in longhand.

Q. And then you send them to some other location where they're typed up. In the case of this one where were they sent to?

A. Grandview.

Q. And then they're returned at a later date for you to sign? [71] A. That's right.

Q. Did sometimes a day or two elapse before

(Testimony of John Catlin.)

they were able to be returned to you for signature? A. Usually the following day.

Q. Not always the following day?

A. No.

Mr. Robinson: I think that's all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

CHARLES F. WILLIAMSON,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please, tell us your name? A. Charles Williamson.

Q. Where do you live? A. Sunnyside.

Q. How long have you lived there?

A. About two years.

Q. Are you a potato grower?

A. Yes, sir.

Q. How many acres of potatoes did you have in 1948?

A. Well, me and the two boys had about pretty close to 300 acres.

Q. Are you acquainted with the potato price support program? [72]

A. Yes, sir.

Q. You have been a potato grower for years, have you not? A. Yes, sir.

Q. How many years have you grown potatoes?

(Testimony of Charles F. Williamson.)

A. Oh, I grewed them in Oregon about 30 years.

Q. And there has been potato price support beginning about 1946, is that right?

A. Yes; I forget just about when it was.

Q. And you have been acquainted with the programs of price support for potatoes for the last several years, then, have you not? A. Yes, sir.

Q. Now, directing your attention to this year, you sold all of your potatoes to the—or sold your crop of potatoes where this year?

A. How's that?

Q. Where did you sell your crop of potatoes this year?

A. Well, we sold them through the warehouses down there at Sunnyside.

Q. You sold them through the Simmons & Sons Warehouse, and the Pasco Growers, and Majonnier's?

A. Yes, and Phipps & Son, through Pacific Fruit.

Q. Then you also have stock, cattle to feed, do you not? A. Yes, sir.

Q. And you have or were feeding last summer about 200 head, or [73] something of that nature?

A. Well, we fed that many later. We was feeding along about——

Q. In August, now.

A. ——along about August there was 80 head, 85, I think. We're feeding now about 350 head.

Q. And were you acquainted with the provisions

(Testimony of Charles F. Williamson.)

of the contract that potatoes—about potatoes purchased for stock food? A. How's that?

Q. Were you acquainted with the provisions of the contract about the purchase of potatoes for stock food? A. Was I acquainted with it?

Q. Yes; did you know, were you acquainted with the fact potatoes purchased for stock food could not be sold in the market to others for retail human consumption? A. Yes, sir.

Q. You knew that? A. Yes, sir.

Q. Now, I'll hand you plaintiff's exhibit 10, and ask you if that's your signature on there, Mr. Williamson?

A. Yes. Nobody can write as bad as that but me.

Q. So that's your signature. I'll ask you the same for 11. A. Yes.

Q. That's your signature. Now, Mr. Williamson, plaintiff's exhibit 10 purports to be a consignee's receipt for 44,500 [74] pounds net weight, or 445—100 pound sacks of U. S. No. 1, and they are loaded—or trucks number 10170 and TLE 1190 are mentioned. Are those the trucks on which the potatoes were hauled in or loaded in? A. I don't know.

Q. Well, when did you sign these consignee's receipts, Mr. Williamson?

A. Well, I signed them there, a bunch there, for Simmons; he just had a bunch there and I just went in and signed a bunch of them; they wasn't signed every day or every load; I signed a bunch of them, and then I come up here to Chinn and signed a bunch of them.

(Testimony of Charles F. Williamson.)

Q. Well, did you purchase any potatoes; I'm not speaking about selling, now, I'm talking about purchasing; did you purchase any potatoes from either the Pasco Growers or Majonnier's warehouse, or Simmons & Sons, for any other purpose than stock food in August, 1948? A. No, sir.

Q. Now, after you signed a contract to purchase stock food potatoes from the Commodity Credit Corporation, who did you call about hauling those potatoes? A. Called up Mr. Waller.

Q. Melvin E. Waller, the defendant in this case? And what instructions did you give Melvin Waller about hauling those potatoes for stock food; what were your instructions [75] to him?

A. I told him to haul them out to my cattle out the other side of Sunnyside.

Q. You told him to haul the potatoes to your feed lot?

A. Yes, in the morning, when he first started hauling.

Q. State whether or not you gave him permission to take any potatoes to Portland or sell any of those potatoes to any other dealers on the market?

A. I never said anything about taking any only to the stock.

Q. You never gave him permission to do that, then? A. No, sir.

Mr. Erickson: That's all, you may examine.

Cross-Examination

By Mr. Robinson:

Q. Charley, just what was your conversation

(Testimony of Charles F. Williamson.)

with Mel. Waller on Sunday, August 22, with regard to hauling potatoes?

A. Well, I called him up and told him to come down with the truck there Monday morning at Simmons', because we was too busy with our trucks to haul them out, so he said that he'd have a truck down there.

Q. Did you have some conversation with him about returning the sacks to Simmons'?

A. Yes, I told him he had to bring the sacks back.

Q. Simmons' gave you credit for sacks, did they, when you returned them? A. Yes. [76]

Q. You had been digging potatoes and hauling them in before that time, hadn't you?

A. Yes, we was digging before that.

Q. Well, now, where were you hauling those to before this time?

A. Well, we hauled to Simmons' that week.

Q. That is the week before August 22, before you talked to Mel Waller?

A. Yes, when we first started we wasn't getting many out because he had so many other growers coming in.

Q. Who wasn't getting very many out, Simmons'?

A. Simmons had a bunch of other growers hauling in, and we wasn't digging very many spuds, so we'd haul these spuds to our stock ourselves, and he wanted more spuds Monday, so we had our four

(Testimony of Charles F. Williamson.)

trucks busy, so we had to hire somebody to haul our potatoes to our cattle.

Q. These are the potatoes you had purchased from the government? A. Yes, sir.

Q. Did I understand you to say, Mr. Williamson, or Charley, I guess you go by, that plaintiff's exhibits 10 and 11, these consignee's receipts, were signed by you in blank before they were ever filled out?

A. Yes, that's the way we always done, sign up a bunch of them ahead, and they'd fill them out when they got ready. [77]

Q. They weren't completed at all, then?

A. No, I just signed there.

Q. Now, I'll hand you plaintiff's exhibit 4 and ask you to take a look at that.

A. Yes, I signed that.

Q. Was that signed by you when there was no writing on it also?

A. I never paid any attention; I just signed it. I think they filled that out afterwards. See, I just went up there and just signed her up.

Q. When you went up and signed it up who did you talk with? A. John Chinn.

Q. He waited on you personally?

A. Well, he was busy there, and one of the girls got one of them slips there and told me to sign it, and so I just signed my name there.

Q. You refer to a slip; what kind of a slip?

A. Well——

(Testimony of Charles F. Williamson.)

Q. You mean one of these forms, plaintiff's exhibit 4, in blank?

A. Well, yes; it was a piece of paper like that I signed. I never read it, I just signed it. She just said "Sign here" and I signed it.

Q. Did you talk to John Chinn that day, do you recall?

A. I don't know; I think he told her to get that slip; I [78] told him I wanted to get some stock feed spuds, and he was busy and told her to get a slip and I signed it.

Q. How many tons did you buy August 19?

A. 500 tons.

Q. You later on in September bought some others, did you?

A. Yes, I bought some more.

Q. Do you recall how much you paid for the ones you bought on August 19?

A. Yes, it was \$2.00 a ton. I gave them a thousand dollars for the 500 tons.

Q. And do you recall how much you paid in September? A. The same price.

Q. How much did you buy in September?

A. I don't know, it was around 200 tons; I wouldn't be certain. I don't think I got a slip on that.

Q. Do you recall ever receiving back a copy of plaintiff's exhibit 4?

A. No, we never got no slip on that.

Q. You weren't given any copy at the time you were up and paid your money? A. No.

(Testimony of Charles F. Williamson.)

Q. Did you also get some kind of a form at the time?

A. Well, this here is what he give me there.

(Whereupon, certificate dated August 19, 1948, was marked Defendant's Exhibit No. 14 for identification.) [79]

Q. I hand you defendant's identification 14, and ask you what that is, Mr. Williamson?

A. How's that?

Q. Explain what that is, this piece of paper, identification 14, that I hand you.

A. "This certifies that C. F. Williamson has made a contract"—

Q. Just a minute, I don't mean for you to read it. I mean, now, just answer this question. Defendant's Exhibit 14 is a certificate signed by John Chinn with reference to potatoes that you purchased?

A. Well, I don't know what it was. I signed, and he give me that, see.

Q. Did he give this to you at the time you signed the exhibit which is form 4, this?

A. Well, I never looked to see what the number was, whether it was 4 or what it was. The only thing I know, that was my name there.

Q. At the time you signed that in blank, Mr. Chinn handed you this piece of paper which is defendant's exhibit 14, is that right?

A. Yes, that's right.

Q. Did you ask him for something like this?

The Court: Those numbers the attorney men-

(Testimony of Charles F. Williamson.)

tions are just numbers we put on them to keep them straight. A. Oh. [80]

Q. Did you have a conversation with Mr. Chinn at the time about this?

A. Yes, I told him "You ought to give me a slip, or something, to show the inspector that I bought them spuds" so he give me that.

Mr. Robinson: I offer it in evidence.

Mr. Erickson: No objection.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 14 for identification was admitted in evidence.)

[Printer's Note: Defendant's Exhibit No. 14 is set out in full at page 327 of this printed Record.]

Q. You and Mr. Chinn had a conversation about this, then, at the time you signed this in blank?

A. Yes, we just—I went in there and wanted to get the spuds.

Q. About how long did the whole transaction elapse from the time you went in until you walked out with this exhibit 14?

A. Oh, I imagine I must have been there five or ten minutes.

Q. About five or ten minutes was the whole period of time?

A. Yes, it was just a very short time.

(Whereupon, Mr. Robinson read Exhibit 14 to the jury.)

Q. Mr. Chinn signed that in your presence?

A. Yes.

(Testimony of Charles F. Williamson.)

Q. Now, Charley, at the time that you signed the contract form in blank in Mr. Chinn's office, at that time did you have any conversation with him about whether you were [81] buying potatoes, or whether the government was still holding title to them? A. There was nothing said about that.

Q. Did Mr. Chinn hand to you or show to you or discuss with you this form FV 111? A. No.

Q. Which is plaintiff's exhibit 5?

A. No, sir.

Q. Did you have any conversation about it at all? A. No.

Q. Did you see any of these forms lying around at that time?

A. No, I never noticed any; I just signed that other there.

Q. I think you said you paid your money at that time, is that correct? A. Yeh.

Q. You bought these potatoes for livestock feed, is that right, Mr. Williamson?

A. That's right.

Q. Did you have any knowledge at that time, Charley, that the government was claiming that it still owned the potatoes after you took delivery of them?

Mr. Erickson: To which we object. The knowledge of this man is not imputable to the defendant.

Mr. Robinson: I'm just cross-examining on a matter that counsel brought out on direct. [82]

The Court: I'll overrule the objection.

Mr. Robinson: Would you read the question?

(Testimony of Charles F. Williamson.)

(Whereupon, the reporter read the last previous question.)

A. No.

Q. Do you have any information, Charley, about when you actually signed the consignee receipts that bear your signature? A. No.

Q. Do you know the date of any of them?

A. No. There was a bunch of them there at Simmons' that he had me sign, oh, it must have been two or three weeks later. He said "Come in and sign up a bunch of them so I can get my money on them." I don't know if that was them or not.

Q. Had you hauled potatoes to your feed lot before Sunday, August 22? A. Yes, sir.

Q. You said you were using your own trucks to haul them out at that time?

A. That's right.

Q. About how many potatoes do you suppose you had out on your feed lot prior to August 22?

A. Oh, we must have had a couple of hundred ton or better.

Q. On your feed lot where the 80 cattle were located? [83] A. That's right.

Q. They must have been kind of deep at that time.

A. Well, he'd drive up and dump some more.

Q. That's a lot of potatoes, isn't it, in a field?

A. Yes, that's a lot of spuds.

Q. Those included the cull potatoes that you

(Testimony of Charles F. Williamson.)

were hauling as well as any others that you would get, is that right? A. That's right.

Q. You did feed a lot of cull potatoes at that time also?

A. Yes, we hauled the culls out there.

Q. Other than telling Melvin Waller that you wanted the sacks returned, and that you had the potatoes available to be hauled out for feed, did you give him any other instructions at all, specific instructions?

A. Well, no, not on them, only that, only that night I called him and had him take out another truck load on my truck.

Q. You're talking about Monday now, aren't you? A. Yes.

Q. You had one of your farm trucks loaded with potatoes Monday afternoon, and you called Mel and talked him into taking them out and dumping them on his place, is that right? A. That's right.

Q. That's the one you refer to now?

A. Yes. [84]

Q. How long had you known Melvin Waller before you called him up at that time, Charley?

A. About two years.

Q. You're neighbors out there, are you?

A. Yes, he lives right across the railroad track from our place.

Mr. Robinson: I think that's all.

Redirect Examination

By Mr. Erickson:

Q. Mr. Williamson, you had signed previous

(Testimony of Charles F. Williamson.)

contracts for purchase of stock food potatoes with the Commodity Credit Corporation, hadn't you?

A. How's that?

Q. You had signed contracts before this one with the Commodity Credit Corporation?

A. No, that's the first time.

Q. Is this the first contract for potatoes you had signed?

A. That 500 tons was the first spuds I bought from the government for feed.

Q. I thought you said you had other potatoes taken out to your feed lot previously?

A. That was culls.

Q. This was the first number ones that went to the feed lot? A. That's right.

Q. You had been in the potato business for a number of years, and you didn't have to read this contract over, you know [85] what the provisions were, is that the reason you didn't read it, or what was the reason?

A. Well, I just knowed they was supposed to be stock feed, and I never bothered about reading it.

Q. You felt that you knew the provisions, then, and that's the reason you didn't read it?

A. Yeh, I just signed it.

Q. And this part here where you said you certify that you've read the terms and conditions of this sale as set forth herein and in form 111, terms and conditions for sale of Irish potatoes for livestock feed, and agree to abide by the terms and conditions, you signed immediately right under that, you

didn't see that, then, when you signed, particularly?

A. No, I never read it.

Mr. Erickson: That's all.

Recross-Examination

By Mr. Robinson:

Q. Mr. Williamson, did you believe that you were buying these potatoes, or that the government was still retaining ownership of them?

The Court: I'll sustain an objection to that; I think the facts should be construed by the jury.

Mr. Robinson: That's all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the [86] witness was excused.)

FRED E. CARVER,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. Fred E. Carver.

Q. Your business?

A. Horticultural inspector.

Q. Where do you reside? A. Yakima.

Q. And what is your capacity now in Yakima, what capacity do you hold with the horticultural department?

A. Horticultural inspector at large in charge of the fruit and vegetable inspection service in this district.

(Testimony of Fred E. Carver.)

Q. Did you hold such a job in August, 1948?

A. Yes, sir.

Q. And potatoes, state whether or not potatoes are under your inspection program?

A. Yes, they are.

Q. Now, directing your attention to on or about August 23, 1948, were you in Sunnyside that day?

A. Yes, I was on August 23.

Q. And did you observe something at the Herrett Trucking Company in regard to loading potatoes—I mean at the Simmons Company warehouse there? Did you see some potatoes [87] being loaded there?

A. Yes, sir, on a flat bed truck.

Q. And what was the number of that truck?

A. TLE 1190.

Q. TLE 1190? A. Yes, sir.

Q. And how were these potatoes being loaded, Mr. Carver?

A. Sewn sacks loaded flat on the truck, and a tarpaulin being rolled back over the load as it was being loaded, with each tier being covered.

Q. What directed your attention to this load of potatoes?

A. For short hauling it isn't customary, wasn't customary for most of those hauling in that manner to be taking quite such good care of potatoes, for those that we figured were going for stock feed.

Q. And who was with you at that time?

A. U. S. Garrecht.

Q. Who is he?

(Testimony of Fred E. Carver.)

A. He's one of the deputy inspectors, a supervising inspector.

Q. And what did you do when you observed this condition?

A. I asked the supervising inspector in that area if that was being certified for commercial shipment or if it was a stock feed shipment.

Q. And what did you ascertain?

A. He advised that to the best of his knowledge it was being [88] certified for stock feed delivery.

Q. Then what did you do then?

A. I told him that it was practically——

Mr. Robinson: I've let it go so far, but I'm going to object to what he told somebody else.

The Court: I thought the question was what he did then.

Mr. Robinson: Well, maybe I should strike his answer.

The Court: Yes, the answer will be stricken, if it's something somebody told you. Just say what you did.

Q. Just tell what you did, Mr. Carver.

A. I went to the hotel, where it was practically noon, where I met the inspector who was certifying the shipment, and asked him if the load was——

Mr. Robinson: Just a minute——

The Court: Conversations that you have with other people outside of the presence of the defendant are not admissible under the rules. You can tell you saw somebody and talked to them. Don't say

(Testimony of Fred E. Carver.)

what they said, and just go ahead and tell what you did.

A. Advised the inspector to keep track of that load and to advise me at the time it left the Simmons warehouse so we could determine whether or not it was going to be delivered to a feed lot or if the truck was moving in violation of [89] our state shipping permit law, outside of the district.

Q. What happened next, Mr. Carver?

A. The truck completed loading approximately 5 o'clock, and Mr. Garrecht and myself went down to see where the truck was stopped, near the Herrett Trucking Company office. I posted an inspector there to advise when it was moved from there, later took up a position myself, about 7 o'clock that evening, and watched the truck until it left the place where it had been located.

Q. Well, what time did it leave the place there?

A. About midnight, our time; I believe that would have been about 11 o'clock under their time.

Q. And was there any other truck that left with it?

A. Yes, an empty van followed it immediately.

Q. Do you know the license number of the van?

A. The trailer number was 1374, TLE 1374; the motorized part was TKE 12310.

Q. Now, did these two vehicles accompany each other?

A. Yes, the flat bed went first, with the van immediately following, and by a circuitous route went

(Testimony of Fred E. Carver.)

out to the Saul Road, to the end of the Saul road, to the Wilson Feed lot.

Q. And what did the trucks do when they got to the Wilson feed lot?

A. One backed up to the other, and some lights, which I presume were gasoline lights, were set up in the van, and [90] they began transferring sacks of potatoes from the flat bed truck to the van.

Q. And where were you?

A. In a farm lane slightly less than an eighth of a mile across an open field.

Q. Who was with you? A. Mr. Garrecht.

Q. Could you see what was taking place?

A. Very plainly, with the position of their lights, and Mr. Garrecht also at my request walked down to a very short distance from the truck, twice, during the proceedings.

Q. And state whether or not the potatoes were transferred from sacks into other sacks?

A. At the start of the operations we could hear potatoes either being dumped loose into the truck or being dumped into sacks; being inside the van we were unable to determine which. Later that evening they ceased that, and transferred the sewn sacks as such to the van.

Q. Well, now, were any dumped for stock food?

A. Yes, after they were well along with the transferring of the load, they brought the lights out and placed them on the flat bed truck, and I would estimate that somewhere between 65 and 75 sacks were opened and dumped in the feed lot.

(Testimony of Fred E. Carver.)

Q. And what time did they finish that operation there that [91] night?

A. Very shortly before 3 o'clock.

Q. That was 3 o'clock in the morning of the 24th?

A. That's right.

Q. Then what happened?

A. The trucks were taken back into Sunnyside, and the van was parked on a lot across the street from the Herrett Trucking Company office, and the flat bed parked just off the street alongside the trucking company office.

Q. About how many sacks were on the van at that time?

A. Well, roughly 250.

Q. And were they covered, or uncovered, in the van?

A. Well, that was a covered van.

Q. I see; and how long did you observe the truck that night?

A. Well, it was raining at that time, and we left at 3 o'clock with instructions to one of the inspectors to go down at 6 o'clock in the morning and find out from any wheel tracks through the mud or grass and weeds whether or not that truck had been moved, and for him to make trips during the morning to determine whether or not it was moved, and I returned myself, Mr. Garrecht and myself, about noon.

Q. You and Mr. Garrecht returned at noon on the 24th?

A. Yes, sir.

Q. About 12 o'clock noon?

A. Yes, sir. [92]

(Testimony of Fred E. Carver.)

Q. What did you see when you came back on the 24th?

A. The van was still in its position on the trucking company lot.

Q. Had it been moved?

A. It had not, from any evidence of tire marks in the ground.

Q. What did you observe next?

A. The truck was moved during that afternoon from the lot to a position at the west end of the block, alongside a small shed, and I posted Mr. Garrecht and another inspector across the street and up a little ways, to observe the operation at that time.

Q. And did you observe them yourself at that time?

A. No, I did not. I left them there to watch that.

Q. When did you observe the van again?

A. About 7 o'clock that evening. After various inspectors had reported its operations, I took up a position across the tracks, as the truck had again been moved, and moved back to its place alongside the shed.

Q. And at 7 o'clock that evening you observed the truck again, and where was it then?

A. In the meantime it had been moved back to the position beside the shed, a block from the Harrett Trucking Company office, and I sent one of the inspectors then to determine what was going on, and we stayed there until the van moved out about 11 o'clock that evening. [93]

(Testimony of Fred E. Carver.)

Q. And when the van moved out, who was the inspector that was with you? A. Mr. Garrett.

Q. What did you do when the van left?

A. We followed it to where it went around to the Harrett Trucking Company office and parked at the south side of the office until midnight.

Q. What happened then?

A. It left and went up to the housing project, and stopped there for twenty or thirty minutes, and then pulled out on the main highway.

Q. What happened then?

A. It went from there to Granger, and across to the Toppenish road, and out through Toppenish to the Goldendale highway, and on the Goldendale highway through Goldendale.

Q. What happened then?

A. They stopped at a small cafe at Goldendale, and the drivers, the driver and his helper, went in and had a cup of coffee and then continued their journey on west on the Goldendale-Portland highway beyond the turnoff that goes to Biggs Ferry.

Q. About how late in the morning was it when you last saw the truck?

A. Shortly before 2 o'clock on the morning of the 25th.

Q. And where was the truck then? [94]

A. It was headed west on the main highway.

Q. On the Oregon side of the river?

A. No, on the Washington side of the river.

Q. That's all, you may examine. Oh, just a min-

(Testimony of Fred E. Carver.)

ute. Was there another load of potatoes that was loaded the night of the 24th?

A. Yes, sir, a small truck with a few sacks on was loaded at the Simmons warehouse that same day.

Q. And where was that——

A. Pardon me; the 24th, or the 23rd?

Q. The 24th—I don't know, what date was it, now? I'm asking about that small load, anyway.

A. That small load that I have in mind was loaded on the 23rd at Simmons'.

Q. And where was that taken?

A. It moved to the Harrett Trucking Company, and Mr. Klassen and Mr. Bruce followed it when it left there.

Q. Did you observe a load going out of the Pasco Warehouse on the 24th?

A. You mean Majonnier's?

Q. Majonnier's, yes.

A. There was a flat bed was loaded there——

Mr. Robinson: I object to the answer as not responsive.

The Court: Better read the question. [95]

(Whereupon, the reporter read the question, as follows: "Did you observe a load going out of the Pasco Warehouse on the 24th?")

A. Yes.

Q. What did you observe with reference to that?

A. The load instead of being loaded of sewn sacks, being loaded flat, crossways on the truck, was loaded with sacks unsewn, and the sacks stacked

(Testimony of Fred E. Carver.)

two high on the truck, and the truck moved down to the Harrett Trucking Company, just across the street from the Harrett Trucking Company office, and parked there for quite a while that afternoon.

Q. Then what happened to it?

A. Well, some sacks were removed from that truck, and it later went out to the feed lot.

Q. And when it came back was it empty?

A. Yes, sir.

Mr. Erickson: That's all.

Cross-Examination

By Mr. Robinson:

Q. Mr. Carver, to kind of boil this down, in case there may be some question about exactly how many loads were involved; on Monday morning the Harrett Trucking Company truck at Simmons Warehouse loaded some 315 or 320 sacks, isn't that right?

A. Correct.

Q. And that's the loading operation that you observed when [96] you went down Monday morning and talked to your inspectors?

A. That's the one that was observed, yes, sir.

Q. That's one of those you observed, possibly?

A. Yes.

Q. That was a flat bed truck? A. Yes, sir.

Q. No side boards of any kind on it?

A. No, sir.

Q. You didn't count the number of sacks on the load, I don't suppose?

A. I did not. The inspector who was check loading would normally do that.

Q. That wasn't your job? A. No.

(Testimony of Fred E. Carver.)

Q. A tarpaulin and some ropes were used to fasten the load on the truck? A. That's right.

Q. And about 5 o'clock it moved down to the Harrett Trucking Company office?

A. That's correct.

Q. The Harrett Trucking Company is on the main street in Sunnyside, isn't it?

A. On the north and south street, yet.

Q. On the main north and south street?

A. Yes. [97]

Q. It's how far from the main intersection?

A. Three blocks, I believe.

Q. You're sure it's that far?

A. Two blocks from the main intersection.

Q. The Harrett Trucking Company property includes their office and shop, and then a lot right across the street on the opposite side of the main street, where they have some equipment parked?

A. They have some equipment, and I don't know as to the ownership.

Q. That's property they use?

A. They use it, yes, sir.

Q. And on Monday, August 23, your observation was that the truck was parked down there; did you say parked on the lot, or the main street?

A. No, it was parked on the east and west street, on the south side of the east and west street, not quite at the east end of the block.

Q. That would be across the street on which the office is on, correct? A. That's correct.

(Testimony of Fred E. Carver.)

Q. Then that truck—you didn't stay at that truck location?

A. I did not. I had one of my deputy inspectors—either I was there or one of the deputy inspectors was there until it moved out. [98]

Q. Now, to get it chronologically straight, we're up to Monday afternoon about 5 o'clock. Did you then see a Williamson truck, or rather a small farm truck, later that evening? A. Yes, sir.

Q. When did you first see that truck, Mr. Carver?

A. Approximately 7 o'clock, I believe, when I first noticed it, when I first re-observed the names.

Q. When you first noticed it was it at the Simmons Warehouse or down at the truck company?

A. When I first saw it it was at the Simmons Warehouse.

Q. And then it was taken to the trucking company location? A. That's right.

Q. And it was moved from there, and two of the other men followed it, but you didn't go with it?

A. That's right.

Q. You didn't see it taken to the Mel Waller place and the potatoes dumped on the ground?

A. I did not see that. The inspectors followed that.

Q. Did your inspectors return then to you after they had been at Waller's place? A. Yes, sir.

Q. When they came back did you see Mel Waller after that unloading operation had occurred, the one at his place, do you remember seeing him? [99]

(Testimony of Fred E. Carver.)

A. I wouldn't know whether I saw him or not. I saw the men that were——

Q. Handling potatoes?

A. ——handling the potatoes. It was dark.

Q. Will you stand up, Mel? This is Mel Waller, Mr. Carver. Do you remember whether you saw him that evening after your men came back from watching the load dumped at his place?

A. We were not as close as we are now, so I wouldn't want to state that I recognized any individual as such.

Q. After your men had returned from watching the potatoes from the small truck dumped at Waller's place—incidentally, do you know when they returned that evening?

A. Approximately 11 o'clock.

Q. That's about 11 o'clock—Sunnyside was on different time than Yakima, weren't they?

A. They were on different time.

Q. Is that 11 o'clock Yakima time or Sunnyside time? A. Yakima time.

Q. About 11 o'clock Yakima time, that would be 10 o'clock Sunnyside time? A. Approximately.

Q. Your men came back from having seen the small truck unloaded? A. Yes, sir. [100]

Q. Did you see the small truck come back about the same time? A. I don't recall.

Q. You don't recall whether it was parked at the Harrett location?

A. I don't recall that it was brought back.

(Testimony of Fred E. Carver.)

Q. Did you see Mel Waller get in his car then and drive out to the south?

A. I didn't notice. There were several private cars moving around. I wasn't paying any particular attention to private cars.

Q. You don't recall having seen one proceed down south out of Sunnyside about that time?

A. None in particular.

Q. Your last observation was when the truck and van—or was there also a car?

A. Truck and van.

Q. Just the flat bed truck and the van?

A. That's right.

Q. Your recollection that you have is that first the potatoes were sacked from one—from the flat bed truck to the van, and then after that, why, what remained of the load was dumped off on Williamson's feed lot; first the sacking operation and transfer to the van occurred at the feed lot, and the rest were dumped off on the ground?

A. There were some apparently being transferred from sacks to [101] either other sacks or loose in the van, and then the major portion of it was the branded sacks, were transferred with no dumping, and the balance of the load, some estimated 70 sacks, were dumped in the feed lot.

Q. That's just an estimate on your part, could have been more or less? A. Yes.

Q. There were about three men doing it, weren't there? A. Four men, I believe, doing that.

Q. Four men all dumping sacks at that time?

(Testimony of Fred E. Carver.)

A. That's right.

Q. The truck and van then returned to town about 3 o'clock in the morning?

A. It got in about 3 o'clock.

Q. You say there were gas lights and things set up so there would be plenty of light for the men?

A. As I recall it, there were two gas lights set up in the van, and those were later moved on to the flat bed truck so they would have enough light to work.

Q. That was the light by which you observed what was going on? A. That's correct.

Q. Now, about what time, Sunnyside time, did darkness come on those days, do you recall?

A. Sunnyside time, did you say?

Q. Yes; that would be the early time. [102]

A. Oh, I'd imagine somewhere around 8 o'clock or 8:30.

Q. That would be about 9 o'clock Yakima time?

A. About that.

Q. You observed when you were watching these trucks that the trucking operation and movements of the Herrett Trucking Company were pretty much around-the-clock operations, weren't they?

A. Well, they seemed to be at that time.

Q. You saw a lot of other trucks moving besides the ones involved here, didn't you?

A. Yes, there was a van, apparently a loaded van, left there at, oh, I would judge around 10 o'clock, just prior to the time the small truck left.

Q. That was on Monday, the 23rd?

(Testimony of Fred E. Carver.)

A. Yes, sir.

Q. And the flat bed and the van were both brought back after this transfer operation at the feed lot, and put on this open lot?

A. No, sir; the van was put on the open lot; the flat bed truck was parked on the same side of the street and just north of the office.

Q. Did you climb in the truck, the van, and count the sacks? A. No, sir.

Q. Did you go in the van at all? [103]

A. No, sir. I went to it to check the number.

Q. To look at the license number, you mean?

A. To re-check it, yes, sir.

Q. To be sure it was still the——

A. Two of the inspectors did, yes, sir.

Q. But you didn't climb into the van at all?

A. No, sir.

Q. That was a van that was capable of holding 15 or 16 ton of potatoes?

A. Very easily, yes, sir.

Q. A pretty large van? A. A large van.

Q. And the following day you didn't get on the job of looking at this until about noon, is that what you said? A. Myself, that's correct.

Q. You didn't see any loading going on before that time, then, of any of the trucks?

A. No, not myself.

Q. The truck that was loaded on Tuesday, the 24th, came down to the Herrett location at about what time?

A. I'm not positive as to the time. I think I first

(Testimony of Fred E. Carver.)

noticed it as being there somewhere between 2 and 2:30, as I recall.

Q. Was it obvious that it had a load of potatoes on it? A. Quite obvious. [104]

Q. The other, the day before, was too, wasn't it?

A. Well, it was to us. We had been working on it, yes.

Q. The tarpaulin didn't conceal the fact there was potatoes on it?

A. As I recall it, there was no tarpaulin over the second load.

Q. You don't remember it on the second one. All right. Then there was some movement of the potatoes during the daylight hours before dinner on Tuesday, wasn't there? A. Yes.

Q. That was on the main street, or within a half a block, wasn't it? A. That's right.

Q. That was a clear day, so you didn't have any trouble seeing? A. That's right.

Q. As close as you wanted to get, anyhow?

A. That's right.

Q. Out at the feed lot you say there were four men. Is it possible that you could be mistaken, because you weren't close enough to observe? It might have been just three?

A. There might have been just three, but I feel quite sure that there were four men there working. I might have been mistaken, as they were moving back and forth on the van and in and out of the van. We might have been mistaken. [105]

(Testimony of Fred E. Carver.)

Q. Fred, you're in charge of the horticulture operations in this district, aren't you?

A. That's right.

Q. The district runs how far?

A. Yakima and Kittitas Counties.

Q. And you say that there was a requirement that there be some kind of a permit if potatoes are shipped out of the district?

A. That is correct. There is a state law that requires that any potatoes going out of the district be covered by a shipping permit.

Q. Did you know at the time when the truck was finally loaded and started out toward Granger and Goldendale, did you know those were potatoes that had been purchased by Williamson from the government?

A. At that time our certificate had been issued and so stated, yes

Q. Weren't these potatoes supposed to be stopped by you when the transportation commenced out of that area there?

A. They hadn't violated any law until they had crossed the county line.

Q. Well, you didn't stop the truck at the county line, did you?

A. No. Had I been wishing to invoke the horticultural law it wouldn't have been necessary particularly to have stopped [106] the truck. I could have contacted the prosecuting attorney and asked him for a warrant for the violator.

(Testimony of Fred E. Carver.)

Q. That was moving then without a horticultural permit? A. That's right.

Q. Did you know at the time or did you think at the time that these potatoes belonged to anyone besides Williamson?

A. I had no reason to think other than the fact that they had been purchased by Mr. Williamson as a stock feeder, as our certificate stated.

Q. You didn't think at the time these potatoes were owned by the government, then?

A. Well, I knew at the time they were stock feed potatoes which were sold under those provisions to the government.

Q. You thought if they were owned by the government you would have stopped the truck before that?

Mr. Erickson: Just a minute, I object to that.

The Court: I think that's argumentative; sustain the objection.

Q. Mr. Carver, you didn't stop the truck and let the people on it know that the potatoes were of a kind that weren't supposed to be moved out of the area there, did you? A. I did not.

Q. Had you done so that would have been the end of it.

Mr. Erickson: Now, just a minute——

The Court: I'll instruct the jury to disregard [107] that, and it will be stricken from the record, an argumentative remark. Is that all the questioning?

Mr. Robinson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

U. S. GARRECHT,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. U. S. Garrecht.

Q. And your business?

A. State Horticultural Inspector.

Q. And during August, 1948, where were you stationed, Mr. Garrecht?

A. Why, part of the time in the Sunnyside area.

Q. Directing your attention to the 23rd day of August, were you in the presence of Mr. Carver at that time, in Sunnyside?

A. Yes, I was.

Q. And what did you observe there with reference to the loading of some potatoes at the Simmons warehouse?

A. Oh, we drove by the place several times to see how the load was progressing.

Q. What directed your attention to the truck in the first instance? [108]

A. Oh, the careful manner in which they were protecting the load from the sun.

Q. And explain how that was.

A. Well, ordinarily, why, if the potatoes were going to be dumped in a feed lot, no-one ever bothered to cover it, because they were due to lay in the sun permanently, and we just thought it was rather

(Testimony of U. S. Garrecht.)

queer that this particular load was being covered.

Q. And then what happened? Just go ahead, now, and relate chronologically, I won't ask you individual questions, but tell us what happened as far as you were concerned from then on during the evening.

A. Well, we followed the load down to the trucking plant, and then parked our cars in different advantageous positions within a block or two of the truck, and stayed there until it moved.

Q. Well, what time did the truck move?

A. Why, it was close to midnight.

Q. And where did the truck go?

A. Why, we followed it out a short way, a lane into a feed lot.

Q. Did you know whose feed lot it was?

A. No, we didn't.

Q. And did any other truck accompany this loaded truck?

A. Yes, there was a large van accompanied the flat bed truck [109] that had the potatoes on it. When they arrived at the feed lot, why, one backed up to the other, and they started transferring potatoes from the flat bed truck into the van.

Q. And how many men were there working?

A. Well, we couldn't see them all; we could hear them talking, but I observed at least five men.

Q. You think there were five men there?

A. Well, I'm not quite positive. After it got real dark I walked up very close to the truck, and I could hear four or five people talking inside the

(Testimony of U. S. Garrecht.)

truck. Most of the time there was only four men working outside, but we didn't know how many were inside.

Q. Was it dark or moonlight at that time?

A. Well, it was fairly light that night.

Q. And how far away were you?

A. Well, I got within about—I would judge about fifty feet of the truck.

Q. About fifty feet? A. Yes.

Q. Did anybody apparently see you there at the van? A. No, they did not.

Q. Then what happened? When did they finish this operation?

A. Well, they actually finished about 3 o'clock in the morning.

Q. And then what happened? [110]

A. Well, we just followed the van back to town.

Q. Now, the potatoes were all in the van, is that right?

A. Well, we figured they dumped between 65, or 50 and 65 sacks on the ground before they left.

Q. And the rest of them were in the van?

A. Yes.

Q. Had they been transferred from one sack to another as far as you know at that time?

A. Well, I couldn't actually tell. We heard them pouring potatoes in the truck. We didn't know whether they was pouring them loose on the floor, or pouring them in sacks; we couldn't tell.

Q. Was the flat bed truck empty, then, when they went out of there? A. Yes.

(Testimony of U. S. Garrecht.)

Q. Then what happened?

A. We followed the truck back to the trucking lot and watched them park it, and then we went home.

Q. Now, where did they park it?

A. Across the street from the trucking company, in what seems to be their parking lot for various vans.

Q. The Herrett Trucking Company parking lot?

A. Well, I imagine it was the Herrett Trucking Company parking lot, because they had two or three trucks there most of the time. [111]

Q. What was the condition of the weather there that night? A. It was raining.

Q. And what time did you cease observing the truck?

A. I believe it was 3 o'clock in the morning.

Q. When did you take up your observation of the truck again?

A. I believe it was about 1 p.m. the following afternoon.

Q. Had the truck been moved since you had last seen it the evening before? A. No, it hadn't.

Q. And what happened at 1 p.m. when you started observing it again?

A. Well, I believe a little bit later in the afternoon, I can't recall just how soon, why, they moved the truck around to a little shed that adjoins the property, and opened the side door, and as far as we could tell, they were re-sacking the potatoes.

Q. Inside of the van?

(Testimony of U. S. Garrecht.)

A. Yes, they were doing it inside the van with the side door open. I walked around on the outside of the truck. I could see the empty sacks coming out of the side door, but I couldn't look in.

Q. What happened after that, then, after you observed them re-sacking?

A. That seemed to keep up more or less until dark, and we were watching from various places around the truck. [112]

Q. State whether or not any more potatoes were placed in the van?

A. Well, during the period—no, I never actually saw any more potatoes go in the van.

The Court: It's time to take our overnight adjournment. Remember what I said to you about not talking about the case either to each other or to any outsider. The Court will adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 4:30 o'clock p.m. the Court took a recess in this cause until Tuesday, February 15, 1949, at 10 o'clock a.m.)

Yakima, Washington,
Tuesday, February 15, 1949, 10 o'clock a.m.

(All parties present as before, and the trial was resumed.)

U. S. GARRECHT,
a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

(Testimony of U. S. Garrecht.)

Direct Examination (continued)

By Mr. Erickson:

Q. Mr. Garrecht, last night I believe we stopped about midnight on August 24, or the early morning of August 25. What happened on that morning with reference to this van truck of potatoes?

A. Why, I believe it was kept under watch by different members of the horticultural department all during the day. [113]

Q. And then what happened as far as you were concerned?

A. Why, that evening we took up a position across the tracks from the van and watched it until approximately 12:30.

Q. What date was that?

A. I believe it was the 24th and 25th.

Q. Did you observe the van pull out for Portland?

A. Yes.

Q. What time was that?

A. Why, I believe it was approximately 12:30.

Q. Well, what night?

A. Well, it was the morning, then, of the 25th.

Q. This was half an hour past midnight on the morning of the 25th of August, 1948?

A. As I recollect, that's it.

Q. Who was with you, Mr. Garrecht?

A. Mr. Fred Carver.

Q. And where did the van pull out from?

A. Why, it was parked in this—alongside this small shed adjoining the trucking company lot, and

(Testimony of U. S. Garrecht.)

it had been there all evening, and as soon as it moved away, why, we followed it.

Q. And where did you—just describe in your own words how you followed it.

A. Well, they took a rather odd way of getting out of town, and stopped right at the edge of town near a housing [114] project, so I drove the car into the housing project back of a house, and turned off the lights, and we just waited approximately half an hour until they started; we wanted to see which direction they were going, to Pasco or towards Seattle.

Q. Well, just go ahead and tell us what happened next.

A. Well, after about a half an hour, why, the truck took off towards Granger, and we stayed fairly close, and they turned off at Granger to the Satus cut-off to Toppenish, and we followed them right into Toppenish, and the truck turned the corner going towards Goldendale, and we followed them to I believe it was the foot of Satus Pass, and they had pulled off at the side of the road right at the base of the pass, and evidently had some engine trouble, so we just passed them and went on up to the summit and had some coffee, and after about an hour, why, they came over the pass, and we followed them down to Goldendale where they stopped again, the truckers stopped and had lunch, and from there on we followed them down past the Maryhill Ferry for about ten miles past the Maryhill Ferry, just

(Testimony of U. S. Garrecht.)

to make sure they were going on the road to Portland.

Q. And when did you stop following them?

A. Well, I think it was about five miles beyond the Maryhill Museum.

Q. Was that about the county line there, or close to it? [115]

A. Well, I wouldn't know about the county lines down there.

Q. Was that main road, the way they were headed, the road to what point?

A. Vancouver, Washington.

Q. It was on the north bank of the Columbia?

A. Yes.

Q. And about what time of the morning was that?

A. Why, I think we stopped following them at fifteen minutes after four.

Q. It was starting to break daylight?

A. Yes, it was just getting daylight.

Mr. Erickson: That's all; you may examine.

Cross-Examination

By Mr. Robinson:

Q. Mr. Garrecht, directing your attention to the evening of Monday, August 23, did you see the small farm truck driven out toward the Waller ranch?

A. Well, from where I was, why, I could see that the truck left, yes.

Q. You saw a small truck driven out toward the Waller ranch that evening, didn't you?

(Testimony of U. S. Garrecht.)

A. Yes.

Q. You didn't follow that truck, did you?

A. No, sir.

Q. You stayed at the Herrett Trucking Company plant, or near there, is that correct? [116]

A. Yes, sir.

Q. That small farm truck returned to the Herrett Trucking Company plant, did it not?

A. Well, that I can't remember, because I wasn't interested in the small truck.

Q. You don't recall its returning?

A. No, but I recall the other two boys that followed the truck coming back and saying where it went, and that it had come back.

Q. And about the time when they came back and reported back to you, do you recall Melvin Waller taking off in his car out toward the south end of town?

A. Well, at that particular time I didn't know any of the boys that were operating down there at all. I wouldn't have recognized him.

Q. You don't remember having seen Melvin Waller, sitting here with the brown jacket on, having driven his car out of town Monday evening, late Monday evening?

A. I know there was a car moved out from the trucking company firm, but I wouldn't know who was in it.

Q. I see. Now, you say when the truck moved out finally on its way over Satus, that it stopped at a house in one of the housing developments there?

(Testimony of U. S. Garrecht.)

A. Yes, just on the edge of town.

Q. Private house, stopped there awhile? [117]

A. Where it meets the main road, yes.

Q. Two men were in that truck, weren't they?

A. Well, we saw two come out as we pulled up behind it, and they stopped the truck. We were too far behind it to see who got out.

Q. You aren't claiming that you recognized any of those boys that got out as being Melvin Waller?

A. No, sir.

Q. They were two truck drivers?

A. As far as I knew; I had never seen any of the boys before, and I wouldn't know them, no.

Q. Now, you talked about some rain or precipitation. Actually, there was nothing more than a very light mist that night, was there?

A. Well, it wasn't a very heavy rain, no.

Q. No; it had been pretty hot that day, on Monday, hadn't it? A. I couldn't tell you.

Q. Now, the shed to which you make reference is one that's just a block off the main street, isn't it? A. Yes, sir.

Q. That's the shed from which the truck started up, and near which or in which some of the potatoes were handled, is that correct?

A. That's right.

Q. That's a kind of an old shack building, apparently a former [118] residence, isn't it?

A. I believe it's just a one-room shack.

Q. Looks like that kind of a building?

A. Yes.

(Testimony of U. S. Garrecht.)

Q. Hasn't any truck doors or anything like that that trucks go in and out of? A. No.

Q. Some of the potatoes were handled outside the shack, too, weren't they, some were set off outside, and some handled inside?

A. Well, there was a few potato sacks out there.

Q. There were some sacked on the outside?

A. I walked by the building several times that evening, and I did see a few sacks of potatoes.

Q. Did one of your boys park a car just across the street from there and sit there in the car?

A. Well, back north up the street at the railroad station, where you could see right down.

Q. You walked by several times when the trucks were there? A. Yes.

Q. The folks were working there; you didn't notice anyone trying to hide anything, did you?

A. No, I couldn't especially say they were hiding anything; the truck was turned in such a way that the side door faced the building, and there wasn't any way to walk between the [119] truck and the building, so I couldn't see anything except the blank side of the truck.

Q. It was arranged for the convenient handling of the potatoes, wasn't it? A. Yes.

Mr. Robinson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

D. C. KLASSEN,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. State your name, please.

A. D. C. Klassen.

Q. Where do you work, Mr. Klassen?

A. Grandview and Sunnyside.

Q. And where do you reside?

A. Grandview.

Q. And your business?

A. Horticultural inspector.

Q. You work under Mr. Carver's office?

A. Yes, sir.

Q. Mr. Klassen, were you called into the investigation of a certain potato case at Sunnyside on August 23, 1948? A. Yes, sir.

Q. And at whose direction did you go to work on that case? [120]

A. In the first place it was called to my attention by Mr. Catlin, who was working at the house where the potatoes were being sorted and loaded.

Q. And did you talk to Mr. Carver, without relating what the conversation was, about this case?

A. Mr. Carver came up; he had noticed the same thing that we had been noticing.

Q. What had you noticed?

A. I noticed that the potatoes were very carefully being placed on this truck, and as each tier was placed on the truck, a canvas was pulled over

(Testimony of D. C. Klassen.)

it, apparently to keep the sun from shining on the potatoes.

Q. Do you know what kind of potatoes these were?

A. These were White Rose potatoes.

Q. And do you know whether or not they were stock food potatoes?

A. That was what we were working on them for, as stock feed potatoes.

Q. Were they stock food potatoes?

A. They were stock food potatoes, yes.

Q. And in what truck were they at that time, what kind of a truck?

A. On a long flat bed truck.

Q. Did you take the license number?

A. I did, sir, yes. [121]

Q. What was the license number?

A. I'd have to check it with my record. That was TLE 1190.

Q. And what did you do after that, Mr. Klassen?

A. It took practically all day to load this truck, and I stayed pretty much in the vicinity to watch the loading of the truck, and then after it was loaded and pulled away I followed it to where it was parked.

Q. And where was it parked?

A. At the south side of the street, at the Herrett Trucking Company office.

Q. On the south side of the street right opposite from the Herrett Trucking Company office in Sunnyside?

(Testimony of D. C. Klassen.)

A. Just opposite, in Sunnyside, yes.

Q. And how long did you observe it there?

A. I watched it until about noon—or until dinner time, and then it was taken over by Mr. Carver and Mr. Garrecht.

Q. You didn't watch it any more after that?

A. Not that particular truck, no.

Q. And what truck did you observe after that?

A. There was a small truck loaded after the large truck was.

Q. What was the license number of that truck?

A. It was TKE 10170.

Q. What kind of a truck was that?

A. That was just a small flat bed truck.

Q. How many sacks were on that? [122]

A. I don't remember; it would be around 100, 150, somewhere in there.

Q. And how long did you observe that truck?

A. Until about 11:30 that night.

Q. And what happened then?

A. Well, we followed this truck out of town. When they pulled out we followed it to its destination, which was a feeder lot or ranch out south of Sunnyside, where the potatoes were dumped.

Q. Do you know who owned this feed lot?

A. We found out afterwards it belonged to Mr. Waller.

Q. This was on the night of August 23?

A. August 23, yes.

Q. And where were these potatoes taken from?

(Testimony of D. C. Klassen.)

A. From Simmons, H. H. Simmons & Sons warehouse.

Q. And do you know what grade they were?

A. Number 1, U. S. Number 1.

Q. Number 1 potatoes? A. Yes.

Q. White Rose? A. White Rose.

Q. And what happened to this truck after it took the potatoes out to the Waller feed lot?

A. It came back to Sunnyside.

Q. Did you observe any more at that time? [123]

A. No, we didn't pay any more attention to it that night.

Q. Did you observe anything the next day?

A. The next day at different times we watched this other van. I had very little to do with it the next day.

Q. What did you have to do with the observation the next day if anything, Mr. Klassen?

A. Just occasionally I'd drive over and see if this particular van, there was a certain van mixed up in this that we were watching, to see if it would move.

Q. And what did you observe during the time you watched it?

A. During the day there was practically no activity around there.

Q. Did you observe it any that night, the night of the 24th? A. Yes.

Q. What happened then?

A. Most of the activity we observed was later in the night of October 23.

(Testimony of D. C. Klassen.)

Q. You mean August 23? A. August 23.

Q. Well, what happened then; what did you observe?

A. Well, Mr. Bruce and I drove out and watched this truck load being dumped at the feeder lot; we went back to the hotel to wait for Mr. Carver, to report, and about 1:30 he came to get me to go out and see where they had watched—had seen these trucks parked, and when we got out there there was this big van and this flat bottomed truck backed back to back, and they had several gas lights there, and they were carrying sacks from the open truck into the van.

Q. Did you observe whether they were dumping the sacks, or transferring the potatoes?

A. They were just transferring the sacks from one truck into the van.

Q. Do you know about how many they transferred?

A. The estimate was right around 300 sacks, somewhere in that neighborhood; couldn't tell exactly.

Q. Did you observe any potatoes being transferred from one sack to another sack?

A. Not that night.

Q. Did you observe that later?

A. The next evening, yes.

Q. Well, go on, tell what happened the next evening.

A. Well, one of the boys had been watching this truck, and then later in the evening this van was

(Testimony of D. C. Klassen.)

parked at a little building along near the O. W. track, and there was a light in this building, and there was activity going on, so to find out what was going on I went up to the window and saw them transferring the branded sacks into plain sacks and loading them into this van.

Q. Where were the potatoes coming from, the branded sacks?

A. They were in this building. [125]

Q. In this little building?

A. In this little building.

Q. Where was this building located with reference to the Herrett Trucking Company?

A. It would be west, just a block west of the Herrett Trucking office.

Q. On whose property was this building?

A. I don't know whose property. It was next to their parking lot where they parked all their vans.

Mr. Robinson: We'll stipulate that was Herrett Trucking Company property.

Mr. Erickson: You may examine.

Cross-Examination

By Mr. Robinson:

Q. Mr. Klassen, in the evening of August 23, then, you and Mr. Bruce followed the—it was kind of a farm truck, wasn't it?

A. That's what it was.

Q. Did it have any name on the outside at all? Did it have Williamson's name?

A. I don't remember that.

(Testimony of D. C. Klassen.)

Q. It didn't have any Herrett Trucking Company name? A. I don't think it did.

Q. It wasn't a commercial truck, was it? It was the type that farmers ordinarily use?

A. It could have been a farmer's truck. [126]

Q. You followed it out to a place you subsequently discovered was Mel Waller's place, and saw it dump potatoes? A. Yes.

Q. You followed it back to town?

A. No. When we noticed all the potatoes were dumped we went back to town. We were satisfied.

Q. You don't follow it back to the Herrett Trucking Company plant? A. No.

Q. You didn't see the defendant Mel Waller, sitting here at the end of the table, drive his car away from the plant after that time? Do you recall whether you identified him dumping off the potatoes at his place?

A. At the time I had never seen Mel Waller.

Q. You were too far away?

A. I was too far away, and up to that time I had never seen Mr. Waller, didn't know who he was.

Q. There weren't any lights put up out there?

A. Oh, yes, they had a light; you could see very plainly what was going on.

Q. They had a lantern of some kind?

A. I don't know what they had, but it was light enough there so you could see the potatoes were being dumped.

Q. When you went out to the Williamson feed lot, after Mr. Carver came down and got you,

(Testimony of D. C. Klassen.)

you didn't see any potatoes [127] being resacked out there? A. No.

Q. The operation had already been going on for some time when you got there?

A. How's that?

Q. The operation had already been going on for some time when you got there?

A. Yes. The only operation at that time——

Q. The flat bed truck was pretty well unloaded?

A. It was about half unloaded.

Q. Then you saw a portion of that load dumped out on the ground at Williamson's place?

A. Yes.

Q. Now, when you observed the next day the truck at this shack or shed to which you had made reference, that was on Tuesday afternoon and evening? A. Yes.

Q. Some sacks of potatoes sitting on the outside of that place, too?

A. I didn't see any on the outside.

Q. You don't recall seeing any on the outside?

A. No.

Q. Did you park in a car near the shed?

A. Not too close. Close enough that we could see the shed.

Q. Close enough you could see? [128]

A. Yes.

Q. Were there lights on around town? Part of this occurred in daylight, didn't it?

A. The part that occurred in daylight I didn't see.

Q. You weren't there during the daylight?

A. No, I was busy elsewhere.

Q. You didn't come down until the evening hours?

A. I was in Sunnyside during the day.

Q. But not down watching the truck or anything? A. No.

Mr. Robinson: That's all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

R. S. BRUCE,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is R. S. Bruce?

A. Right.

Q. Where do you live, Mr. Bruce?

A. I live in Ellensburg.

Q. What is your position?

A. I'm with the joint Federal-State inspection service, Horticultural Department.

Q. The State of Washington? [129]

A. Right.

Q. During August, 1948, were you at Sunnyside? A. I was.

Q. What were your duties there?

A. I was inspecting potatoes.

(Testimony of R. S. Bruce.)

Q. Well, directing your attention to August 23, were you in Sunnyside on that date?

A. I was.

Q. And did you observe the load of potatoes near the Herrett Trucking Company? A. I did.

Q. And what directed your attention to that load?

A. I was instructed by my immediate supervisor to keep the load under surveillance.

Q. When did you first see it?

A. It was the evening, the exact hour I don't know, sometime I would say between 6 and 7.

Q. It was still light? A. Yes, it was.

Q. Who was your immediate supervisor?

A. I wouldn't say for sure whether Mr. Carver or Mr. Klassen instructed me.

Q. And what did you observe?

A. In the evening all that I saw was just sitting at a distance of about a block or two from this truck and watching [130] it to see if it was moved.

Q. And how long did you watch it?

A. I was there until relieved by one of the other men; I would say for an hour and a half or two hours.

Q. And did you observe it again?

A. Yes.

Q. And when did you observe it again?

A. I was relieved to eat my dinner, and then I came back possibly at 9 or 9:30.

Q. And how long did you observe it then, or until what time did you observe it?

(Testimony of R. S. Bruce.)

A. That particular truck was still there when I left.

Q. And when did you leave?

A. There was another truck, a small truck, left, and Mr. Klassen I followed the small truck.

Q. You followed the small truck?

A. Right.

Q. Now, about what time did the small truck leave?

A. Sometime in the neighborhood of between 10 and 11, I would say.

Q. What was the license number of the small truck?

A. May I refer to my notes to be sure?

Q. Yes. A. It was TKE 10170.

Q. And where did the small truck go? [131]

A. It proceeded south of town, past the Carnation Milk plant I would say for a distance of a mile and a half or two miles, and pulled into a farm lane, and the men on the truck started dumping potatoes over it looked to be a fence.

Q. Were the potatoes dumped, as far as you know, all of them? A. Yes.

Q. Do you know what kind of potatoes these were? A. No, I didn't see the potatoes.

Q. And did you find out subsequently where this place was that the potatoes were dumped?

A. Pardon me?

Q. Do you know where the potatoes were dumped, who owned the property or what feed lot it was?

(Testimony of R. S. Bruce.)

A. I have heard that it belonged to——

Q. Well, you can't tell what you heard. You can tell if you know, however.

A. I didn't ascertain it myself.

Q. Then what did you do?

A. After observing this small truck we came back and reported, I am sure, to Mr. Carver.

Q. And what time did you come back and report to Mr. Carver?

A. I would say sometime after 11.

Q. 11 o'clock, this was on the night of the 23rd of August? A. Right. [132]

Q. Monday night?

A. I wouldn't say whether it was Monday night. I know it was the 23rd.

Q. Then what did you do?

A. After reporting to Mr. Carver and talking to him a few minutes, I went to the hotel with Mr. Klassen and prepared to go to bed, and it was possibly after midnight before I finally did go to bed; I sat there and talked to Mr. Klassen. I know it was after midnight. I was back outside of the hotel, just walked out on the sidewalk before I went to bed.

Q. Did you do any work on this case the next day? A. Yes, I did.

Q. What did you do?

A. Starting at approximately 6 o'clock the next morning I observed a van parked on the Herrett Trucking Company parking lot at Sunnyside.

(Testimony of R. S. Bruce.)

Q. Do you know the license number of that van?

A. The van was—the tractor part of the van was TKE 12310, and the trailer part was TLE 1374.

Q. And where were these parked?

A. On the Herrett Trucking Company lot.

Q. And when did you first observe them?

A. A very few minutes after 6 a.m.

Q. Just go ahead and relate what happened, in your own words. [133]

A. The supervisor at Grandview called me by telephone and asked me to observe this truck. It was raining lightly, and I made periodic checks of say, possibly 20 minutes or half an hour; I would drive by to see that the truck had not been moved. I did that until noon.

Q. Then what happened after that?

A. Some of the other boys took over.

Q. Did you have anything more to do with this case after that, after noon on the 24th?

A. Well, at various times we naturally talked to Mr. Garrecht and Mr. Carver and Mr. Klassen, the other fellows that were watching this truck.

Q. Did you make any more observations yourself after the 24th at noon?

A. Not that I recollect, Mr. Erickson.

Q. Your activity in connection with the observation ceased, then, at noon on the 24th?

A. Yes. I talked to the boys that evening while

(Testimony of R. S. Bruce.)

they were watching the truck parked on the other side. I was working.

Q. You were working?

A. I was working, but at various times I had driven over and talked to the boys watching the truck. Mr. Carver was one of the men there at the time.

Q. Did you observe any loading in the afternoon? A. I did not. [134]

Mr. Erickson: That's all.

Cross-Examination

By Mr. Robinson:

Q. You say it was raining lightly on the morning of Tuesday, August 24? A. It was.

Q. That was more of a mist, wasn't it, than any great downpour at that time?

A. It dampened the ground.

Q. You went out with Mr. Klassen the evening before, when the small farm truck was driven out and completely unloaded at this location that you've mentioned? A. I did.

Q. Did you after that time come back by the Herrett Trucking Company plant?

A. I wouldn't say what route we took back to town.

Q. You don't recall stopping by the—you know where the Herrett Trucking Company office is, don't you? A. I do.

Q. You don't recall coming by the Herrett Trucking Company plant and stopping there for any time at all?

(Testimony of R. S. Bruce.)

A. I wouldn't say I did. I don't know which route we took back to town. I know we came past the Carnation Company plant, but from there I don't know where we went.

Q. You didn't observe the defendant, then, drive his own car out away from the Herrett Trucking Company plant that [135] evening?

A. I did not.

Q. You say you saw some of the operations on Tuesday afternoon when you happened to be back from time to time talking to Mr. Carver and Mr. Garrecht and others?

A. I didn't see any other operation; all I saw was the truck still parked. That was my designated duty, to see that the truck had not been moved, and I naturally noticed it in the afternoon, that the truck was still in the vicinity.

Q. How late that afternoon did you stay in that vicinity?

A. That I couldn't say, because I was working in the warehouse. It was just at various times if I'd drive by for something and see one of the boys.

Q. Did you see it in the evening?

A. I saw it in the evening, yes.

Q. Was it parked near a shed or shack that evening? A. It was.

Q. Did you see any operations then?

A. I didn't.

Mr. Robinson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

JOSEPH V. CARUSO,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. State your name, please; what is your name?

A. Joe V. Caruso.

Q. And where do you reside, Mr. Caruso?

A. Portland, Oregon.

Q. And what is your business?

A. Wholesale fruit and produce business.

Q. What's your location in Portland?

A. 935 S. E. Belmont.

Q. And you deal in potatoes during the season?

A. We deal in potatoes and all commodities.

(Whereupon, purchase order was marked Plaintiff's Exhibit No. 15 for identification.)

(Whereupon, three tags were marked Plaintiff's Exhibit No. 16 for identification.)

Q. Mr. Caruso, state whether or not on August 25, 1948, you met a Homer Waller in Portland? A. I did.

Q. Did you make any purchase from a Homer Waller?

A. I purchased one truck load of potatoes.

Q. I'll hand you plaintiff's identification 15 and ask you to state whether or not that's the purchase order?

A. That's the purchase order with my writing on it.

(Testimony of Joseph V. Caruso.)

Q. And that's your signature on the purchase order? A. Yes.

Q. The total price was—the quantity was 323 sacks of No. 1 spuds, and the price \$2.10, the total price \$678.30? [137]

A. Yes, sir.

Q. The date was August 25, 1948?

A. Yes, sir.

Q. And it was purchased from the Hathaway Farms by Homer Waller, is that the way it was signed? A. Yes, sir.

Q. Is that the official purchase order in your files?

A. That is for out-of-state purchases.

Mr. Erickson: I offer the purchase order.

Mr. Robinson: Mr. Waller signed this as "H. Waller"? Is that Mr. Waller's signature, the "H. Waller" in the lower left hand corner?

A. That's right.

Mr. Robinson: No objection; I haven't any objection to it.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 15 for identification was admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 15 is set out in full at page 328 of this printed Record.]

Q. (By Mr. Erickson): What kind of sacks were these potatoes in?

A. They were in an irregular sack; it was not a branded sack.

(Testimony of Joseph V. Caruso.)

Q. Would you say there was any printing or labeling on the sacks when you saw them?

A. No, there was none whatsoever.

Q. Did you examine the potatoes to see what kind they were? A. Yes, I did. [138]

Q. What kind were they, Mr. Caruso?

A. To my knowledge they would pass as U. S. 1.

Q. And they were White Rose potatoes?

A. White Rose.

Q. What directions did you give to Mr. Waller about the sacks having no grades on them?

A. When I seen the sacks were not labeled or graded, why, to protect our interest I wanted him to make out some kind of a certification that they would be U. S. 1 potatoes, and in case I got into any trouble with inspectors I would have someone to go back to.

Q. I'll hand you plaintiff's identification 16 and ask you what those are?

A. Those were the tags that we furnished him to put on the sacks, and he graded them U. S. No. 1, Hathaway Farms, Granger, Washington.

Q. He wrote those out and put one on each sack?

A. Yes, sir.

Mr. Erickson: I offer 16 in evidence.

Mr. Robinson: One tag similar to these in this identification was put on each bag, Mr. Caruso?

A. Yes.

Mr. Robinson: Let's see, there were about 323 bags, did you say? A. Yes, sir. [139]

Mr. Robinson: No objection to these.

(Testimony of Joseph V. Caruso.)

The Court: They will be admitted.

(Whereupon, Plaintiff's Exhibit No. 16 for identification was admitted in evidence.)

(Whereupon, check, Caruso Produce, No. 3197 dated 8/25/48, amount \$678.30, was marked Plaintiff's Exhibit No. 17 for identification.)

Q. (By Mr. Erickson): I'll hand you plaintiff's identification 17, Mr. Caruso, and ask you what that is? A. That's one of our company checks.

Q. I'll ask you to state whether or not that is the check that's made payable for purchase order, Plaintiff's Exhibit 15, the memorandum of purchase?

A. That's the one, and that's the only purchase we ever made from them.

Q. That's \$678.30, that check?

A. Yes, sir.

Q. Has that check been cleared and the money paid? A. Yes, it has.

Q. It's made out to——

A. It's made out to Hathaway Farms.

Q. ——to Hathaway Farms.

Mr. Robinson: No objection.

Mr. Erickson: I'll offer 17.

The Court: Admitted. [140]

(Whereupon, Plaintiff's Exhibit No. 17 for identification was admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 17 is set out in full at page 329 of this printed Record.]

(Testimony of Joseph V. Caruso.)

Mr. Erickson: That's all, you may examine.

Cross-Examination

By Mr. Robinson:

Q. Mr. Caruso, you bought these potatoes, did you say, at \$2.10 a sack or hundred?

A. \$2.10 a hundred at Portland.

Q. Was that a fair price at that time at that place?

A. It was a fair price.

Q. You didn't beat the market down any in buying those potatoes, did you?

A. No, we didn't beat the market down.

Mr. Robinson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

JAMES V. SPAULDING,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Will you state your name, please?

A. My name is James Verl Francis Spaulding.

Q. And what is your business?

A. I'm a special agent with the Federal Bureau of Investigation.

Q. And during August, 1938—I mean 1948, and September, 1948, were you stationed at Yakima?

A. Yes, I was.

Q. Mr. Spaulding, state whether or not you were called to make some investigation in this case?

A. We received a complaint from the chief of

(Testimony of James V. Spaulding.)

police at Sunnyside, Washington, regarding a truck-load of potatoes which had been parked in the vicinity of the Herrett Trucking Company and which at that time he felt shouldn't have been there, and he believed that perhaps that since the program, or the price support program, was in effect, and in turn that these potatoes might be part of that particular crop——

The Court: I wouldn't go into too much detail on that. We want to know what you did.

A. All right. We received our original complaint from the chief of police at Sunnyside, Washington.

The Court: That answers the question.

Q. What did you do pursuant to that?

A. Well, upon the reception of the complaint, I was advised by my office to start an investigation and to find out what the particulars were regarding this particular load of potatoes which Chief Hill had brought to our attention.

Q. Did you make an investigation?

A. Yes, I did, sir.

Q. Who worked with you on the case?

A. For about two days I worked by myself, and at such time as [142] I felt that perhaps we might be getting to some rather pertinent information, I then asked Special Agent Middleton of the F.B.I. if he would assist me.

Q. During the two days did you interview the defendant Homer Waller——

A. I did.

Q. ——or rather, Melvin Waller?

A. Yes, I did.

(Testimony of James V. Spaulding.)

Q. When was the first interview you had with Melvin Waller?

A. It was about the 21st of September. I had gone down to the—no, excuse me; it was about the 16th of September that I first went to the Herrett Trucking Company, and at that time I asked if the owner or whoever was in charge of that business was available. I was told by Mr. Robinson, the secretary-treasurer of the company, that Homer Waller, who was the owner, wasn't available at that time.

Q. You mean Melvin Waller?

A. I mean Melvin Waller; excuse me; so I returned about the 21st of September, at which time I met Mr. Waller and asked him if it were possible for he and I to have an interview regarding the truck load of potatoes that had been parked adjacent to his trucking concern.

Q. And did you have the interview?

A. Yes, we had the interview.

Q. Who was present? [143]

A. I was by myself at that particular time.

Q. What was the conversation between you and Mr. Melvin Waller?

A. Well, I asked Mr. Waller just why this particular load of potatoes had been parked adjacent to his property, and he said that it was just brought there and parked awaiting a transferral out to a feed lot. It was rather a lengthy conversation, and at that particular time there weren't very many facts gotten which I believe is pertinent to the case at this moment, because I had, or I felt it necessary to familiarize myself through numerous interviews with members

(Testimony of James V. Spaulding.)

of the Horticultural Department here in Yakima, as well as with Mr. Garner, to know exactly what the government's position was in the price support program. Up to that time I didn't know——

Mr. Robinson: Your Honor, I think we'll have to restrict this witness.

The Court: Yes, I think that part will have to be stricken and the jury instructed to disregard it. We just want to know what you did and what the defendant said to you, if anything.

A. All right.

Q. This was on September 21? A. Yes.

Q. Did you have another interview with Melvin Waller?

A. Yes, I had another interview with Melvin Waller at which [144] time I was accompanied by Special Agent Middleton.

Q. And when was that?

A. That was about the 23rd of September.

Q. And where did that interview take place?

A. The interview started at Mr. Waller's place of business at the Herrett Trucking Company, and at that time I asked Mr. Waller if he would give us all the facts in the case as he knew them, and he requested us then that since he wasn't a lawyer, and he didn't know too much law, that he felt he should have some advice of a lawyer, so we suggested that we go up to his lawyer, who was Mr. Salvini at that time.

Q. That's Mr. Salvini here in court?

A. Yes.

Q. What took place then?

(Testimony of James V. Spaulding.)

A. In the presence of Mr. Salvini, Mr. Waller told us that he had had a verbal agreement with Mr. Williamson to utilize some of his trucks, inasmuch as Mr. Williamson's trucks were tied up in hauling potatoes from Mr. Williamson's farm into the inspection sheds in Sunnyside. He said that Mr. Williamson had also asked him what particular feed he was giving to his cattle, the 38 head of cattle or approximately 38 head of cattle that Mr. Waller owned, and I don't recall exactly what he said at that time about the feed, but he said that Mr. Williamson [145] had asked him if he had ever considered feeding them potatoes, so he said no, he hadn't, but when he found out that it was possible for him to buy potatoes under this program and therefore give them to his cattle, why, he became interested in the idea. He told us that part of the verbal agreement that existed between he and Mr. Williamson was that for the utilization of his trucks, or one of his trucks, he in turn could have some of Mr. Williamson's potatoes until such time as he could get potatoes here in Yakima under the program, so he said that one of his trucks had been sent up on his order to the I believe it was the Simmons sorting shed in Sunnyside where it was loaded, according to Mr. Waller, with about 200 or 250 sacks of potatoes.

At that time, or at that particular moment, we asked him if he knew why that load of potatoes had been covered over with a tarpaulin which they had, and he said no, he didn't know why, he thought it was certainly being overly careful on the part of the driver to do it, didn't know it was done, he certainly

(Testimony of James V. Spaulding.)

had not given any instructions to do that. Well, the truck, according to Mr. Waller, moved down to the post adjacent to the Herrett Trucking Company where it remained all that day. I asked him why at that time the truck was brought there and left to remain there, and he said well, he didn't know exactly, because there had [146] been an element of time in there now, and he couldn't recall, but he had other trucks tied up doing other work, and therefore this particular truck was just left to lie there for that day.

He said that about 11 o'clock on the night of August 23, to the best of his recollection, he, together with his brother Homer Waller, and I believe the other two men that he mentioned were a fellow by the name of Smith and a fellow by the name of Sanders, took the flat bed truck which had been parked alongside the Herrett Trucking Company, together with a van, out to Williamson's feed lot. There they set up two gasoline lanterns and they started the transferral of the potatoes from the flat bed truck to the van, and also dumping some of the same potatoes into the feed lot. I asked Mr. Waller approximately how many sacks had been dumped, and he said to the best of his recollection it was about 75 or 100, he didn't know exactly, and I asked him to the best of his recollection how many might have been placed into the van, and he thought that perhaps it might have been 100 or so, which would then establish or make a total of approximately 250 sacks which he thought was originally on that flat bed.

He said after the potatoes had been transferred

(Testimony of James V. Spaulding.)

into the van, they brought the van back to the Herrett Trucking Company and parked it in the parking lot where they keep [147] these larger trucks of theirs, for that particular night. The next day, which I believe was August 25——

Mr. Robinson: 24th.

A. ——or 24th, he said that one of his trucks again was sent to I believe it was Majonnier's sorting shed, where they picked up some more potatoes that belonged to Williamson, and brought them down and re-sacked them in the vicinity of the Herrett Trucking Company, I believe on the street—I don't know the name of the street, offhand, I don't think some of those streets down there have names, but the one which lies behind the parking lot, opposite the Herrett Trucking Company. He said there that the potatoes that they had were re-sacked and placed into the van, which made an approximate load, to the best that he could figure out, of about 16 tons. That afternoon he sent his brother Homer Waller to Portland to attempt to contact somebody so that this load of potatoes could be sold. He said then about midnight on the 24th the truck, the van, left with two drivers and it proceeded to Portland, Oregon, where it was met the following morning by Homer Waller and in turn Homer took the truck, with the two drivers, and they brought it down to Caruso Produce, and at that time the potatoes were sold, and I believe Mr. Waller said that he received a check in the vicinity of \$672.00, I don't recall the exact amount. [148]

Q. Did Melvin Waller say who the check was made out to?

(Testimony of James V. Spaulding.)

A. Yes, he said that the check had been made out to Hathaway Farms, Sunnyside, Washington.

Q. Did he say anything about the endorsement of the check?

A. Yes, he told me that the Hathaway Farms is owned by a man by the name of Kenneth Hathaway, who is his brother-in-law, and he had called his brother-in-law and told him he had received this check made out to the Hathaway Farms, and with his permission could he endorse it and have it cashed, and he received that permission from his brother-in-law, Kenneth Hathaway.

Q. Did he say he did cash the check, then?

A. Yes, he said he cashed the check.

Q. What did he say about the money he received from the check?

A. He said he put that into the funds which were maintained in the office of the Herrett Trucking Company, and I believe at that time I asked him if that wouldn't have caused an inquiry on the part of Robinson, his secretary-treasurer, as to how that money got in there, and he said no, he had full control of his business management, as he could very easily tell his employees what he wanted done, and if that substantial amount of money should suddenly be with the other cash, there would be no reason for alarm, it was just there because he put it there; the origins of it wouldn't be questioned. [149]

Q. Did he say anything about the books of the trucking company showing the movement of this truck?

A. Yes; when I first went down there speaking to

(Testimony of James V. Spaulding.)

Mr. Robinson I attempted to establish the fact if any substantial records were maintained on trucks that made trips out of the state or in the state, and I was informed by Mr. Robinson that it was a law of the State of Washington that you would have to maintain records. I requested him, having identified myself to him, to go through the records to see if we could possibly find any truck that had made trips from oh, I think I asked him August 20 to up around the 25th or 26th. He gladly produced them, and there was no record of any truck having made trips out of the State of Washington or even out of Sunnyside at that time. He informed me that they utilized several trucks around Sunnyside and Yakima, and there was no necessity to keep any record of those, only an hour or two, but on any sizeable trip that any truck has to make carrying any freight at all, they do have to maintain a record.

When I returned on my first interview with Mr. Waller, which as I say I think was about the 21st or 22nd of September, I again asked Mr. Waller if they did keep any record of that. He informed me that his duties were not centered around the maintenance of those records, inasmuch as he had too many other things to do. He told [150] me he was a passably good mechanic, and therefore he devoted most of his time in maintaining those trucks, he left the paper work up to Mr. Robinson, the secretary-treasurer, so again I asked Mr. Robinson to go through those records to see if they could find any record of any of those trucks having made any trips from August

(Testimony of James V. Spaulding.)

20 up to the 25th or 26th, and again the results were the same, there was no record.

I again asked Mr. Waller if he could account for that fact, and he said no, he couldn't. He wasn't too interested in it, inasmuch as the paper work didn't mean anything to him; if Robinson couldn't account for it he certainly couldn't. I asked if it was possible it was omitted for any reason; he said he didn't know. I think that's about all we said at that time about going through those records.

Q. Did you check the records to see whether they showed the receipt of any money for a load of potatoes sold to Caruso?

A. No, at that time I did not, sir. I just asked Mr. Waller if he had received any money from the transaction which had taken place with Caruso in Portland. He said yes, he had received a check in the amount of \$672.00 or something about that. He didn't know exactly, and I didn't know at the time.

Q. Did Melvin Waller say anything about transferring the [151] potatoes from branded sacks to plain sacks?

A. Yes, he said that, he told me, as well as his brother Homer had told me, that when he had gotten down to Portland to Caruso Brothers, that Mr. Caruso had questioned the origin of this particular load of potatoes, inasmuch——

Mr. Robinson: I don't believe that's responsive.

The Court: I'm afraid it isn't.

Mr. Erickson: Let me ask the question again.

The Court: He shouldn't testify to anything Homer Waller told him out of the presence of the defendant.

(Testimony of James V. Spaulding.)

A. He was in the presence at that time.

Q. Yes, was Homer Waller and the defendant Melvin Waller present?

A. Yes; Mr. Middleton and myself had gone down to re-interview Mr. Waller, and while we were there we asked him if it was possible to speak to Homer, and he said it was all right with him, and he asked permission if he could remain in the office with us, and that was granted, so in the interview which took place between Mr. Melvin Waller, Homer Waller, agent Middleton, and myself, we asked Homer just what happened when he got to Portland with this load of potatoes. He told us that Mr. Caruso had questioned the origin of these potatoes, inasmuch as they were loaded in unbranded sacks, and he through past experience had found that potatoes coming from the area had always been in [152] labeled sacks, and consequently would establish where those potatoes had come from, but after talking with Mr. Caruso for I don't recall how long, but he said they had dickered around for quite a while, and eventually Mr. Caruso had agreed to give \$42.00 a ton for these potatoes, believing that they had come from the Hathaway Farms in Sunnyside.

Q. Did Melvin Waller say anything to you about himself purchasing any potatoes from the Commodity Credit Corporation?

A. Yes, he said that after Mr. Williamson had discussed the possibility of he buying potatoes under this program as feed for his livestock, he had sent his brother Edward up here to Yakima to purchase I believe about 149 or 150 tons of these potatoes. He

(Testimony of James V. Spaulding.)

said that Edward had returned to Sunnyside and told him that he had handed him what looked like a very unauthoritative piece of paper, and he said to him, "Is that all you got?" and he said, "No, that's not all I got; that's all they gave me to take back here, but I signed a contract, which is a government contract," and he says, "It looks pretty legal," so Homer then said——

Mr. Robinson: Your Honor, this is a conversation, unquestionably, but I think it's outside the issue. They might talk about the weather. I'm sure the conversation occurred about the subject—— [153]

The Court: Well, it's hard to tell what materiality it has until I see where it's leading.

Mr. Erickson: Well, I'll withdraw the last part of the question, stop here, and permit cross-examination.

The Court: Well, I think it's time for recess now. Just a moment, I'll let the jury go out first before we recess.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: I thought from the prior offer of one of these identifications, I believe, and from the testimony here that perhaps the government had in mind offering proof that the defendant subsequent to this transaction which is involved in the indictment purchased a large quantity or contracted to purchase a large quantity of potatoes from the Commodity Credit Corporation, and I thought that we'd better see what was proposed here and get some ruling on it

(Testimony of James V. Spaulding.)

in the absence of the jury, if that's what you propose to do. It's my understanding that similar transactions which bear upon the question of intent may be shown even though they're subsequent, if they're not too remote in time.

Mr. Erickson: Yes.

The Court: My idea is that if the government could show that this defendant a short time after this transaction contracted to buy a very large quantity of potatoes [154] and didn't have stock to feed them to, a fair inference would be that he intended to sell them on the market in Portland or elsewhere, and it would have a bearing on intent. Is it your position that would not be admissible under any circumstances?

Mr. Robinson: Yes, this length of time afterwards.

The Court: Well, what length of time is this?

Mr. Robinson: This is two days after the other transaction, the knowledge having been obtained that there was any claim by the government in the meantime, and no copy of the contract ever having been delivered to the defendant by that time.

The Court: Well, it certainly wouldn't have any probative value in showing that he had any knowledge of the terms under which these potatoes were sold to the government, but here you have the very important question of whether this defendant was acting honestly or had the intent to wrongfully take these potatoes, and in that connection I think sometimes subsequent conduct is admissible, if it isn't too remote in time, as bearing on intent.

Mr. Robinson: Well, it seems to me it would be

(Testimony of James V. Spaulding.)

only prejudicial here, if there were any evidence at all in this, I don't know what they're trying to lead up to, the contract signed, no copy delivered later on, signed by [155] a brother, and contracted, and paid, putting money down. That's all the government was interested in, he had the livestock.

The Court: Perhaps we'd better find out what the government proposes.

Mr. Erickson: It's my idea to seek the admission of this exhibit, Melvin Waller's contract to purchase potatoes, dated August 25, in order to show his intent. An important contention made by him will be his innocent motive and lack of intent to sell these potatoes. We wish to show that he purchased a very large quantity of potatoes, nearly half a million pounds, on a subsequent date, the 25th of August, which is the same day as the purchase order to Caruso was signed, it's the same day as the check was dated, the same day as the potatoes were taken to Portland; it's so close in point of time that it's almost part of the same transaction, and it certainly is admissible to show his motive, his scheme, his intent, and what he had in mind here at the time of taking this load to Portland. I realize the whole question is what intent the defendant had when he took this load to Portland. This other action is important to explain and illustrate his intent at that time, that was the purpose of it.

Mr. Robinson: Your Honor, counsel stated in his [156] opening statement that these were purchased, and they were purchased, there isn't any question about that, but our whole basis of the defense was

(Testimony of James V. Spaulding.)

that these were Williamson potatoes in the present action; these are potatoes that he had purchased himself. It's an entirely different matter.

The Court: Well, if the Court holds that these are Williamson potatoes, that ends the lawsuit.

Mr. Robinson: Well, that's our claim of what the defendant thought they were, because he's the fellow he was dealing with. Now we come to a transaction where the defendant is dealing with the government at a two day later time. No question they claim the intent is on Monday, not on Wednesday; true, the potatoes had to be transported overnight.

The Court: I can't base my ruling on admission of evidence on what you say your client is going to testify to, or your witnesses. There isn't anything in the record at the present time that would show any shadow of claim that the defendant relied on the permission of Mr. Williamson in taking these potatoes, because Williamson testified he didn't give him permission to sell them; he said to take them to the feed lot, so I have to assume on the basis of this offer there wasn't any authority from Williamson, and that being the case, if a man takes these feed potatoes, sells them without authority in Portland, [157] and the same day he sells them he buys a very large quantity for feed purposes himself, of course if he can show he had cattle enough to justify feeding them, that would indicate he got them for a legitimate purpose, but it seems to me it would have a bearing on intent.

Mr. Robinson: The testimony is he had 28 or 30 cattle. Williamson had 75 cattle, and he'd bought 500

(Testimony of James V. Spaulding.)
tons, Williamson, bought 500 more tons.

The Court: What was this purchase?

Mr. Robinson: 149 tons.

Mr. Erickson: This purchase is for 4,100 hundred-weight; that's 410,000 pounds, or 205 ton, I believe.

The Court: 205 ton?

Mr. Erickson: If my mathematics are right.

Mr. Robinson: Well, this covers two shipments; this shows September 23 on it, your Honor, just as the other did.

Mr. Erickson: Well, it's dated August 25, and of course they can't all be taken the same day. It's 50 tons a day.

Mr. Robinson: No, but it was two transactions with the government. Mr. Chinn testified he didn't come out until a month later; he ordered 149 ton, there's no question about that, that's what he bought that day, a third of the amount or less than a third of the amount Williamson had [158] bought for the same number of cattle. That's just a coincidence.

The Court: I'm not arguing this now, but it's always been my understanding that while as a general rule evidence of other offenses cannot be shown to prove the offense charged, that where there are other transactions that show a general scheme and show an intent with which the act charged is done, that that may be shown even though it might involve other transactions and might even show other offenses. Of course, here we haven't any question of any other offense, it's just another similar transaction, and I don't believe it makes any difference as to the application of that rule whether the transaction that bears upon intent were immediately before or about the

(Testimony of James V. Spaulding.)

same time or a little after; the fact it's a little subsequent I don't believe of itself makes it inadmissible, if it's not too remote in time, and it seems to me this has some probative value bearing on intent, and I'll admit it and instruct the jury. Did you have something else?

Mr. Robinson: Yes, I did, your Honor. I don't know how long the case is going on, but I'm up against a tough proposition. Mr. Rossier, the Mayor of Sunnyside and justice of the peace, is one of our character witnesses, and a close friend of his, his funeral is being had this [159] afternoon at Goldendale.

The Court: Is he a character witness?

Mr. Robinson: Yes.

The Court: Do you have any objection to putting him on out of order?

Mr. Erickson: No, I have no objection.

The Court: Well, put him on right after the recess.

Mr. Robinson: All right.

Mr. Erickson: I have a couple more questions to ask.

The Court: I think we should finish the direct evidence first.

Mr. Erickson: So that the record may be straight, then, plaintiff's identification 12 and 13 are admitted in evidence?

The Court: I think that you had better offer them in the presence of the jury.

(Short recess.)

(Whereupon, the following proceedings were had within the presence of the jury.)

(Testimony of James V. Spaulding.)

Direct Examination—(Continued)

By Mr. Erickson:

Q. Mr. Spaulding, there's a question I'd like to ask you; did you have any conversation with Mr. Waller as to his knowledge of the potato program and the use of potatoes for stock feed? [160]

A. Yes; when we were at Mr. Salvini's office, we had asked him, after he had told us the story of what had happened to this load of potatoes, if he knew just where these potatoes came from. He said yes, they were Mr. Williamson's potatoes. We asked him if he knew that they were government property. He said well, he couldn't be sure of the fact of whether they were government property or not; he knew that Mr. Williamson was involved in the government with these potatoes; he knew that Mr. Williamson was working into the program, and I think as he explained, he didn't know the inner working or the mechanics of the whole operation, but he knew that Williamson was tied up in the government with this particular crop of potatoes that he was dealing in at that time.

Q. Did he give you any reason for signing the contract with the government on August 25 to purchase stock feed potatoes?

A. Yes, he said that due to the fact that Mr. Williamson had interested him in the fact of feeding potatoes to his livestock, that he in turn came up here, or had his brother Edward come up to Yakima and order these potatoes for him. I asked him also, in the presence of Agent Middleton, if this was the only load of potatoes that he ever intended to sell,

(Testimony of James V. Spaulding.)

and he said no, it looked like it might be a profitable business, and he would have sold more, but he [161] did say that when he became aware that he had done something wrong, then he felt that he should discontinue any practice of selling any more of these potatoes.

Q. That's all.

A. Now, I asked him what he thought was wrong, and he said well, the fact that Williamson had been tied up in the government, plus the fact his brother Edward had come back from Yakima and said he had signed a contract on it, all those things led him to the conclusion that he'd better not sell any more potatoes.

Mr. Erickson: You may examine.

The Court: You may retire from the stand. We want to put on another witness out of order. All right, you may call your witness out of order.

Mr. Robinson: Thank you. Mr. Salvini, my associate, will interrogate Mr. Rossier.

The Court: Very well.

Mr. Erickson: I wonder if counsel can approach the bench?

The Court: Yes.

(Whereupon, the following proceedings were had at the bar, out of the hearing of the jury.)

Mr. Erickson: Is it your idea that Melvin Waller will take the stand himself?

Mr. Robinson: Yes. [162]

Mr. Erickson: Well, now, this defendant has been convicted of a felony, and I want to show that, and

I don't want to take the chance of bringing up this previous conviction, it would be reversible error at this stage of the trial, and I want to ask this character witness, because he's just been off parole since 1938, from the penitentiary or reformatory, and I'm at a disadvantage in cross-examining him.

Mr. Robinson: You don't have any idea how long this case will last? He has to go to the funeral at 2 o'clock.

Mr. Erickson: I don't like to take the chance about asking him about a conviction at this stage of the trial.

The Court: No. The United States Attorney is entitled to know whether the defendant is going to take the stand or not.

Mr. Robinson: No, there's no secret about that, nor about the conviction, nor about Mr. Rossier's knowledge of it, but this funeral is very important to him.

The Court: When is the funeral?

Mr. Robinson: Two o'clock, at Goldendale.

The Court: Well, we won't finish this case today; there isn't any possibility of that, is there?

Mr. Erickson: I think we'll finish our case about that time, and then if he'd come up after that time—

Mr. Robinson: There isn't a chance of getting back this afternoon, if we could put him on in the morning.

The Court: Well, I don't believe we could finish this today.

Mr. Robinson: I don't think so. I intend to argue at some length.

The Court: We could call him tomorrow.

(Whereupon, the following proceedings were had within the presence and hearing of the jury.)

JAMES V. SPAULDING,

a witness for the plaintiff, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Robinson:

Q. Mr. Spaulding, I believe you said that you first got into this case on the 16th of September, 1948, is that correct?

A. I believe that was the correct date; that was the date that I had received notice from my office to continue or start my investigation.

Q. And it wasn't until the 21st of September that you talked with Melvin Waller, then?

A. I believe that was the date, yes, sir.

Q. And at the time you talked to him there were present officer Middleton and Mr. Salvini and Homer Waller, is that right?

A. No; the first time I spoke to him alone.

Q. Oh, I see; you talked to him alone? [164]

A. Yes.

Q. With Melvin Waller alone?

A. With Melvin Waller alone, yes, sir.

Q. And after you talked with him awhile, he suggested you go up to Mr. Salvini's office?

A. No; at the end of that first day I had asked Melvin if he would consider the whole thing, think over what I had told him, because I did relate to him information that I had obtained during the course of my investigation, and he said that he

(Testimony of James V. Spaulding.)

wanted to cooperate in every way that he could, but that he would like to have a little time to think it over, and I said fine, I'll be back to see you tomorrow or the next day, I don't recall exactly what I said at that time, then the next day I had Agent Middleton with me, and then we talked to Melvin again, and as I say, when we asked him if he was willing to give us the complete story, he said that not knowing a lot about the law, and feeling we did, he felt he should have some legal advice. We said, "Would you like to get your lawyer?" and he said yes.

Q. That was after September 21, is that right?

A. Yes, it was.

Q. And did he tell you at that time, Mr. Spaulding, that this transaction of the potatoes was a personal transaction of his? [165]

A. He told me that it was a verbal agreement that existed between he and Williamson, because Williamson had requested he use some of his trucks to haul some of the potatoes that Williamson had bought from the government out to his feed lot.

Q. Yes, he said it was a verbal agreement for hauling between he and Williamson?

A. Yes.

Q. And that he had the interest in the Hathaway Farm potato crop, he told you that, didn't he?

A. Well, he said, I believe the story there was that his brother or brother-in-law, Ken Hathaway, had just recently or within the past few years become interested in farming, and wasn't too good at it, and at one time when he was first starting, why, he had asked Melvin to assist him financially, which he

(Testimony of James V. Spaulding.)

said he gladly did, and I guess the debt was still outstanding at the time that I was speaking to Melvin, because he said——

Q. Just answer my questions, Mr. Spaulding, whether he said—if he didn't say it, maybe we can arrive at what he did say, but he told you that he had a financial interest in the potato crop of the Hathaway Farms, isn't that correct?

A. No, he said that he had lent money to his brother-in-law to get started, and if his brother-in-law could in any way get the money back to him, or he could assist him in [166] getting it back to him, then he would gladly do it.

Q. He told you that he had an arrangement by which the crop of potatoes his brother-in-law was producing would be available to him?

A. No.

Q. You don't recall his making it?

The Court: He says he didn't make it. If you ask him if he doesn't recall, that's like asking, "Have you quit beating your wife". It isn't fair to say you just don't recall it, then.

Q. Melvin Waller told you, did he not, that the hauling of the potatoes involved to Portland was a personal transaction of his own?

A. Well, the hauling of the potatoes——

Q. Yes or no?

A. I can't answer it by just saying yes or no, sir.

The Court: Let's see, read the question.

(Whereupon, the reporter read the last previous question.)

(Testimony of James V. Spaulding.)

The Court: You mean personal as distinguished from the trucking company?

Q. Yes.

A. Oh—well, I can't just answer it, your Honor, by yes or no.

Q. Well, I'll ask it again, and see if we can't—I don't [167] know why you can't answer it, but did Melvin Waller explain to you the organization of the Herrett Trucking Company?

A. Yes, he said that he, his brother Homer and brother Edward owned the business and operated it together, and I believe also Robinson.

Q. Kenneth Robinson?

A. Yes, Kenneth Robinson, I believe; I don't know his first name, I'm not sure.

Q. And did he explain to you the acquaintance that he had with Charley Williamson?

A. Yes, he said that Charley Williamson and he had been friends, and that they were aware of one another's activities inasmuch as he knew Charley as a farmer, and Charley in turn knew him as a trucker, or an operator of a trucking concern.

Q. He told you that Ed Waller had come up to Yakima and contracted or signed a contract for a quantity of these potatoes, with the government?

A. Yes, upon his instructions he did.

Q. Did he tell you about the six or seven ton of potatoes that Williamson had given to him on Monday, August 23?

A. Yes, he said that Williamson felt that until such time as Melvin Waller could get these potatoes up here at the Yakima Horticultural Department,

(Testimony of James V. Spaulding.)

that he would let him [168] have some of his potatoes to start feeding to his cattle, until such time as he could get his own, and I think he also said that it was sort of a means of Williamson paying him at that immediate time for the utilization of his trucks.

Q. He told you that he knew nothing about any claim that these were government property until later on, after he had talked with his brother Ed, after Ed signed the contract, isn't that right?

A. Well, he said when we were in Mr. Salvini's office that he didn't know all the inner workings of this program, he knew that it was going on, and he knew that Mr. Williamson was involved in it, and he knew that the potatoes he was taking were part of the potatoes Mr. Williamson had contracted for with the government, because that was the reason he was taking them out to the feed lot, to accommodate Mr. Williamson in getting them out there, inasmuch as Williamson didn't have any trucks to get them out there himself, and then at that time——

The Court: I think you've answered the question. Just try to answer the questions as briefly as possible.

Mr. Robinson: Well, I think that's all, your Honor.

The Court: Do you have any further questions?

Mr. Erickson: No, I have no further questions.

(Whereupon, there being no further questions, the [169] witness was excused.)

JAMES MIDDLETON,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is James Middleton?

A. That's right.

Q. You're a special agent of the Federal Bureau of Investigation?

A. Yes, sir.

Q. During August and September, 1948, where were you stationed, Mr. Middleton?

A. I was attached to the Seattle office and assigned to the Yakima resident agency.

Q. You worked out of Yakima?

A. Yes, sir.

Q. When were you called on this potato case involving Melvin E. Waller?

A. I first became aware of it in September. I was called in on it on September 23, or in that reasonable proximity. I believe it was the 23rd of September.

Q. Who called you into the case?

A. Mr. Spaulding, he's another agent, he requested that I accompany him to Sunnyside to interview Mr. Waller.

Q. That was on September 23?

A. Yes, sir.

Q. Did you interview Mr. Waller at that time?

A. Yes, sir.

Q. And where did you interview him?

A. We first talked to him at his trucking concern, at the office, and then we proceeded to Mr. Salvini's office in Sunnyside.

(Testimony of James Middleton.)

Q. Who was there when you talked to him at the trucking firm?

A. Mr. Spaulding and myself and Mr. Waller.

Q. Was Mr. Garner there at that time?

A. Not on the 23rd of September.

Q. And then you went to Mr. Salvini's office?

A. Yes, sir.

Q. And who was present there?

A. Mr. Salvini, Mr. Waller, Mr. Spaulding, and myself.

Q. What was the conversation when you got up to Mr. Salvini's office? Just give it as nearly as you can.

A. Well, we talked to Mr. Waller, and he advised us that he had talked to Mr. Salvini the night before, and told us about the particulars of the questioned potatoes.

Q. Well, what was said, now?

A. Well, Mr. Waller went into the story, saying that he had obtained the—he had entered into an agreement with Mr. Williamson to haul potatoes for Mr. Williamson to Mr. Williamson's feed lot, and that Mr. Williamson had also interested him in feeding a few of the potatoes himself; [171] that up to this time he had not fed any, and during one of the hauling trips he took the load of potatoes out to Mr. Williamson's feed lot to dump them, and he stated that while proceeding to dump them there, he entered upon the idea that these were pretty nice potatoes, that if he could put them on the open market he might gain a pretty good

(Testimony of James Middleton.)

price for them, and he dumped approximately at that time, he made a statement that he thought there was around 200 or 250 hundred pound sacks of potatoes on the truck load, and he told us that he thought, or as best as he could calculate he helped dump approximately 100 of the hundred pound bags, and transferred the rest of the potatoes into other sacks, his own sacks, so that Mr. Williamson would have his sacks back, and came back into Sunnyside and parked the potatoes on the truck, and left them there, approximately a half a truck load, and the next day he completed the truck load of potatoes from more than he was hauling for Mr. Williamson, and then that night the truck was driven by two of his drivers to Portland, Oregon, where they were sold to Caruso Brothers.

Prior to this time he had instructed his brother Homer to go to Portland and try to find an outlet for the potatoes, and he sent the truck down to Portland, Oregon, Homer met the truck, and they delivered the potatoes to Caruso Brothers. It was then that the truck returned back. [172] I wouldn't say the truck returned back, I don't know about that, but Homer returned back with the check for the potatoes made out to Hathaway Farms, who Mr. Waller explained was his brother-in-law, and Mr. Waller also explained that while the truck was down at Portland, or while Homer was away, he had his other brother come to Yakima and see about himself buying some more potatoes, which he said that his brother did. We asked Mr. Waller

(Testimony of James Middleton.)

then if he had any idea whether or not he was going to feed the potatoes that he was trying to enter into agreement to buy, or whether he had an idea to market those also, and Mr. Waller stated that he thought it was a pretty good deal marketing these nice potatoes, and that he intended to market them also, but when his brother Ed Waller came back to Sunnyside he said that he had signed a pretty official paper, and he thought maybe he shouldn't do that; and we asked Mr. Waller for a signed statement to the effect, and Mr. Salvini advised against it, and that was about the—terminated the interview.

Q. Did Melvin Waller state whether or not he received the money from that check for \$678.30 payable to the Hathaway Farms?

A. Yes, sir, he said that Homer returned, and he received the check made out to Hathaway Farms.

Q. And did he state whether or not the money was deposited in [173] the books of the Herrett Trucking Company?

A. I don't believe he said it in those words. He said that he took the check to Grandview, Washington, where they had their banking account, and that he telephonically called his brother-in-law, Mr. Hathaway, and requested Mr. Hathaway's permission to sign the check and put it in the trucking firm, which he said he did.

Q. Did he state anything about his knowledge of Williamson's agreement with the government?

A. He stated that he didn't know they were

(Testimony of James Middleton.)

government potatoes, however, he knew that the potatoes—he was hauling them for Mr. Williamson, and that he had some idea that Mr. Williamson was in some way connected with the government in the potatoes, but he did not say that he knew they were government potatoes.

Mr. Erickson: That's all for this witness, but I will offer now plaintiff's identifications 12 and 13, the Waller contract.

The Court: Let me see them, please. They will be admitted.

(Whereupon, plaintiff's Exhibits Nos. 12 and 13 for identification were admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 12 is set out in full at page 325 of this printed Record.]

[Printer's Note: Plaintiff's Exhibit No. 13 is set out in full at page 327 of this printed Record.]

Cross-Examination

By Mr. Robinson:

Q. Mr. Middleton, Mr. Waller told you, did he not, that his relationship with Mr. Williamson was a rather close friendly [174] relationship?

A. Yes, sir.

Q. And that the matter of hauling these potatoes for Williamson was pretty much to oblige Williamson, whose trucks were tied up in hauling his own potatoes in?

A. Yes, sir, he said it was purely a verbal

(Testimony of James Middleton.)

agreement between the two, that they were somewhat friendly.

Q. Well, he didn't say they were somewhat friendly, did he?

A. Well, he said they were friendly.

Q. They were friendly? A. Yes, sir.

Q. With reference to the Hathaway potatoes, Melvin Waller told you and Mr. Spaulding that he and Hathaway had an arrangement to market Hathaway's potatoes jointly, didn't he?

A. He told us, I believe the figure was close to \$300.00 he had loaned Mr. Hathaway, because Mr. Hathaway's circumstances were such that he requested to borrow some money, and that he loaned Mr. Hathaway this \$300.00 with the understanding that he be paid back when his potatoes were marketed, and his original intention was to take Mr. Williamson's potatoes and replace them with Mr. Hathaway's potatoes, and that way he would obtain a better price for Mr. Hathaway's potatoes, because his were not quite as good as the ones that he was hauling for Mr. Williamson.

Q. About how long were you and Spaulding and Salvini and Waller [175] together when you had this conversation?

A. I couldn't be sure, but it was approximately an hour and a half, and I believe it was directly before lunch, that's the way I recall it.

Q. You had lunch before it was over. Melvin Waller also stated, did he not, Mr. Middletown, that Williamson had told him that he, Waller,

(Testimony of James Middleton.)

could haul these potatoes either to Waller's place or Williamson's place?

A. Mr. Waller told us that Mr. Williamson suggested that he take some potatoes and feed to his own, Mr. Waller's, livestock, that they were a good feed and they were cheap feed.

Q. Waller answered all your questions that you and Mr. Spaulding had, didn't he?

A. Yes, sir.

Q. He told you to clarify it, that it was Ed Waller, his brother, who went up and contracted with the government to purchase some additional feed potatoes, on Wednesday, August 25?

A. I didn't catch the first part of it.

Q. He told you that it was his brother, Ed Waller, that went up to Yakima and contracted for some additional potatoes?

A. That's right, I believe.

Q. It's your recollection he told you that it wasn't himself that came up? [176]

A. He told us it wasn't himself, yes.

Q. I see. Did I understand your testimony, Mr. Middletown, that he told you he didn't know anything about these being government potatoes until his brother talked to him after he had got back from Yakima, and said he'd signed an official looking document that looked like it might mean something, is that right?

A. I believe he said that; he said he didn't know the potatoes were property of the government, that he knew Mr. Williamson had some kind

(Testimony of James Middleton.)

of a deal with the government, but he didn't know the mechanics of it, and he didn't know until his brother came back from Yakima that the contract said they were government potatoes.

Q. He didn't say they were government potatoes; I believe your testimony was that the brother said he signed a rather official looking document?

A. That was my testimony.

Mr. Robinson: That's all.

(Thereupon, there being no further questions, the witness was excused.)

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

(All parties present as before, and the trial was resumed.) [177]

WILLIAM G. H. GARNER,

called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is William G. H. Garner?

A. That is right.

Q. And what is your business?

A. I'm a special agent with the United States Department of Agriculture.

Q. And as such what are your duties in regard to investigations?

A. Well, I am required and assigned at various times to investigate the operation of the various programs administered by the department.

(Testimony of William G. H. Garner.)

Q. Of Agriculture? A. Of Agriculture.

Q. Directing your attention to the case of Melvin Waller, did you make an investigation in that case?

A. I did.

Q. When were you called to make an investigation in that case?

A. I was called about the 25th of August.

Q. And what day did you come to the Yakima valley for the purpose of pursuing that investigation?

A. August 27, I arrived here, 1948.

Q. And what did you do when you arrived here, briefly?

A. Well, I first of all contacted Mr. Claus Peters, who is [178] the chairman of the Washington State P.M.A. committee, and Jim Wright, who is a committee man, and conferred with them about the request which Mr. Peters had made to my headquarters in San Francisco.

Q. Now, what happened next?

A. I next conferred with Mr. Chinn, and later with Mr. Carver.

Q. And then what happened?

A. Well, pursuant to that, I took a statement from Mr. Carver and then we began to observe the operations of the Herrett Trucking Company.

Q. When did you first investigate the operations of the Herrett Trucking Company?

A. We started to investigate their operations a day after my arrival and after talking to Mr. Carver, which would be August 28.

(Testimony of William G. H. Garner.)

Q. What investigation did you make?

A. Well, we——

Q. You say “we.” Who do you mean by “we”?

A. I mean myself with the help of Mr. Carver and his assistants, his inspectors. We observed their operations, the movements of potatoes from the various potato sorting sheds in the Sunnyside area, to and from the Herrett Trucking Company in Sunnyside.

Q. Did you make an investigation as to the stock food potatoes sold by the Commodity Credit Corporation to [179] Williamson, Charles F. Williamson?

A. Yes, we did.

Q. When did you make that inquiry?

A. Well, most of these movements of the potatoes were with the Williamson potatoes, which were being moved at that time, then——

Q. Pardon me; at the investigation at the Herrett Trucking Company did you make an investigation of the stock food potatoes sold to Mr. Williamson and reportedly hauled by Melvin Waller’s truck to Portland, Oregon?

A. I did. My first——

Q. Go ahead.

A. ——my first contact with the Herrett Trucking Company was on September 13, when I examined their records, and at that time examined their records in their office in Sunnyside, and at that time also talked with Mr. Melvin Waller and with Mr. Robinson, the secretary-treasurer of the company.

(Testimony of William G. H. Garner.)

Q. What was the purpose of your investigation of the books of the Herrett Trucking Company on the 13th of September?

A. The purpose of the examination was to determine whether or not the books would disclose any movements of potatoes to Portland, as had been reported to me, on or about the—movements alleged to have taken place on or about August 23.

Q. Did the books disclose such movement? [180]

A. They did not.

Q. What did Melvin Waller say about the failure of the books to disclose that movement, if anything?

A. Well, I did not at that time disclose to Mr. Waller my real purpose; in other words, I did not bring up with him the specific subject of this particular movement. That was not discussed at that time.

Q. What did you do next in this investigation, Mr. Waller?

A. I, together with Mr. Carver and his inspectors, continued to observe the operations, and then I was later contacted by a Mr. Spaulding of the F.B.I.

Q. And what did you and Mr. Spaulding do then?

A. On September 27, 1948, Mr. Spaulding, Mr. Middletown, and myself proceeded to the Herrett Trucking Company place of business in Sunnyside, and we interviewed Mr. Melvin Waller, and later Mr. Homer Waller.

(Testimony of William G. H. Garner.)

Mr. Robinson: What date was that?

A. September 27th.

Q. Were there any conversations that took place with Melvin Waller at the office of the Herrett Trucking Company on September 27?

A. Yes. At that time we discussed with Mr. Melvin Waller the entire transactions which had been reported with respect to the movement of Williamson's stock feed potatoes from Sunnyside into Portland. [181]

Q. And did you later retire to some other place, or did you carry on the conversation in the office?

A. No, we carried on the entire conversation in the office.

Q. Repeat what was said and who said it, as near as you can, the substance of those conversations on the 27th of September.

A. Well, Mr. Waller was first of all asked whether or not he had on August 23 caused a load of Williamson's stock feed potatoes to be taken out to the Williamson stock feed lot and there transferred to a covered truck which we knew to have been taken out at the same time. Mr. Waller advised that he had caused these potatoes to be taken out there at that time, and that he had also caused this covered truck to be taken out, and that he, his brother Homer, and two other employees, one by the name of Sanders, the other by the name of Smith, had gone along, and that they had transferred this load of potatoes, U. S. No. 1, from the flat bed into the covered truck,

(Testimony of William G. H. Garner.)

with the exception of he thought about 100 sacks and about 100 sacks he stated he believed had been dumped in the feed lot.

He further advised that the potatoes at that time, or most of them, were transferred from the branded sacks in which they had been sacked, to plain wheat sacks which he himself had caused to be taken out at the time from his place of business in Sunnyside. He further stated that [182] after this transaction had taken place, this transferring—just to go back, he advised that lights had been set up out there on the lot at this time, and this happened around 12 o'clock at night when the truck left Sunnyside.

He advised further that the truck had then been brought back into Sunnyside and had been parked in the immediate vicinity of his place of business. He advised us further that the next day he had caused one of his trucks, the Herrett Trucking Company trucks, to go to another potato shed, Majonnier's, and pick up another load of U. S. No. 1 stock feed potatoes which he knew to be Williamson's stock feed potatoes, and that that truck had then been driven down to his place of business where a number of sacks had been transferred from that truck to the covered truck, and that also at that time some of the potatoes had been transferred from the branded sacks into the plain wheat sacks in this shed, in the shed which he described as being located right across from his place of business.

(Testimony of William G. H. Garner.)

He advised that he had filled out the load in the covered truck to the point where he had a little over 16 tons, or 323 sacks, and that he had then on the evening of the 25th, or rather in the early morning of the 25th, around between 12 and 1 o'clock, he had caused that truck to be driven into Portland, and that that same day, or [183] rather on the 24th, he had sent his brother Homer Waller into Portland for the express purpose of making arrangements to sell this load of potatoes. He stated further, advised further, that his brother Homer had been able to sell these potatoes to the Caruso Produce Company in Portland for a price of \$2.10 a hundredweight, and that his brother had obtained from the Caruso Produce Company a check in payment in the amount of \$678.30 which his brother had brought back to Sunnyside and given to him, and that he in turn had taken that check to the Sunnyside bank and had obtained the money for the check.

Q. Did he make any statement about whether or not the books of the company reflected the receipt of this check?

A. He advised that they did not reflect the receipt of the check or anything whatsoever to do with the transaction.

Q. Did he advise you that the books of the Herrett Trucking Company reflected the movement of this truck to Portland?

A. No, he stated that no record had been made on the books of the Herrett Trucking Company

(Testimony of William G. H. Garner.)

with respect to the movement of this truckload.

Q. Did you mention to Mr. Waller the fact as to whether or not he had signed a contract on August 25 for the purchase of potatoes from the Commodity Credit Corporation?

A. Yes, that was brought up. I knew that such a contract had been executed, having checked the records, Mr. John [184] Chinn's records. He advised that he himself had not signed that contract for the purchase of stock feed. He said that he had sent his brother Ed up to Mr. Chinn's office, together with a certified check payable to the Treasurer of the United States, or a money order, I'm not sure which, but it was payable to the government, payable to the Treasurer, and that his brother Ed had signed to take delivery of 149 tons of stock feed potatoes at the rate of \$2.00 a ton, and signed his name to it, that is, Melvin E. Waller.

Q. Did he make any statement of what his purpose and intent was in signing this contract with the Commodity Credit Corporation for these potatoes?

A. He stated that at the time that he made this movement, that he caused this truck load of potatoes to go to Portland, it looked like a pretty good way of making money, and that he had in mind the intention of making some additional shipments, but that after his brother came back and explained to him that he had had to sign a contract which appeared to be quite important, he had decided that it was not such a good idea.

(Testimony of William G. H. Garner.)

Q. Now, did he make any statement to you about his knowledge of the Williamson potatoes being government potatoes? If so, what did he say?

A. He stated that he knew that these potatoes which he had [185] caused to be picked up, the two loads on the 23rd and the 24th at the Simmons shed and the Majonnier shed, that he knew that they were stock feed potatoes, that he knew that Williamson was getting them from the government as stock feed potatoes under the price support program. However, he stated further that he did not understand all the mechanics of the program, but that he knew these potatoes were in some way mixed up with the government, and that the government had an interest in them.

Mr. Erickson: That's all, you may inquire.

Cross-Examination

By Mr. Robinson:

Q. You've heard Mr. Middletown's testimony, haven't you? A. I have, sir.

Q. Mr. Middleton and Mr. Spaulding were present at the time this conversation occurred?

A. They were.

Q. Mr. Waller told you at the time of this conversation that the handling of these potatoes was a personal transaction involving him, wasn't it, and not the Herrett Trucking Company?

A. I have no recollection of him making any such statement as that; I don't think he did.

Q. Told you that he'd paid the drivers himself, didn't he?

(Testimony of William G. H. Garner.)

A. No, I have no recollection of him saying that.

Q. He told you about his friendship with Williamson, and their [186] relations?

A. He mentioned the fact that he knew Charley Williamson, and that was all; that he was a friend of his, yes.

Q. Told you that he knew that Charley Williamson had no objection, didn't he?

A. Objection to what?

Q. To his using any of these potatoes that he was hauling for Charley Williamson?

A. No, that was discussed: he didn't say anything like that. He definitely stated that he knew these potatoes were supposed to go to Williamson's feed lot.

Q. He also told you that when Homer went to Portland he had other business down there, too, didn't he?

A. I don't think so; I don't remember that.

Q. The first contact you had with the defendant and Herrett Trucking Company was on September 13, is that correct?

A. That is correct, September 13, yes.

Q. What was the purpose that you stated to the personnel there, the reason that you called at the office?

A. The reason that I gave was that we were checking up on the operations of the 1948 potato price support program, and I wished to see what

(Testimony of William G. H. Garner.)

movements of potatoes had been made by the Herrett Trucking Company.

Q. They opened up their books, showed you everything they had, didn't they? [187]

A. Yes, they were very cooperative.

Q. You didn't ask them at that time anything about the particular shipment which you had in mind, did you?

A. No. At that same time we were continuing our investigation to determine whether this was continuing.

Q. Just answer the question.

A. No, I did not.

Q. Thank you. Mel Waller told you when you had your conversation with him on September 27, 1948, did he not, that he knew they were Williamson potatoes at that time?

A. That is correct.

Q. But he told you further that he didn't know the government claimed any ownership to them, didn't he?

A. He stated that he knew the government was mixed up with them some way, and had some interest in them.

Q. He didn't at any time tell you that he knew that the government claimed to own these potatoes at the time that he took them, did he?

A. He did not; not in those words.

Mr. Robinson: That' all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Erickson: The government rests.

The Court: The jury will retire. [188]

(Whereupon, the following proceedings were had without the presence of the jury.)

(Whereupon, Mr. Robinson made a motion on behalf of the defendant for judgment of acquittal.)

(Whereupon, Mr. Robinson presented argument in support of the defendant's motion for judgment of acquittal.)

(Whereupon, the Court delivered its ruling on defendant's motion for judgment of acquittal, as follows:)

The Court: In construing the language of this statute I think the Court should regard not only the immediate section here, its language, but also the whole Act of which it is a part; the act which sets up and provides for the activities of the Commodity Credit Corporation provides for the dealing with the problem of agricultural surplus. I think that can be done even in the case of a criminal or penal statute, although they are under the well known rules strictly construed.

In the first place this statute obviously is not the conventional larceny statute, although it is headed larceny and conversion of property, and it contemplates punishment of interference with the corporation's interest in property, which is ob-

viously much less than the whole ownership as ordinarily contemplated. It provides that whoever shall willfully conceal, remove, dispose of any [189] property owned or held by or mortgaged or pledged to the corporation—while that is not involved here, I think the Court can take into consideration that in a proper case the penalty provision of this section could be applied to property merely held by the corporation in which it had no other interest except possession; it could be applied to property mortgaged to the corporation; it could be applied to property pledged to the corporation, and with reference to the ownership, I think that we might have a very different situation here if we had the conventional sale and purchase transaction where there was a provision such as is present here of a reservation of title in the seller, but here again I think we have to regard the whole program and its purpose and effect.

It appears from the evidence here that in this instance the Commodity Credit Corporation, which is an agency of the government acting under the Department of Agriculture, of course was buying these potatoes in order to hold up the price, and they bought them at the pegged price of two dollars and something a sack, a hundredweight, and then they turned around, and regardless of the terms of this transaction which is evidenced by exhibit 4, they call it a sale, but who would say that turning potatoes back to the grower at 10 cents a hundredweight, in the sacks, is a sales transaction in the ordinary construction [190] of the term? I think

the Court can take judicial notice that new sacks cost more than 10 cents, and regardless of what it may be called, it is in the interest of the whole program, they're permitting a nominal buyer to take this government property and use it for one purpose only, that is, to feed livestock.

The government could have if they had wanted to, dumped them, burned them, destroyed them, but they thought it was in the public interest to use them as feed, but I think looking at this logically by its four corners, it may be regarded as permission of the government to Mr. Williamson to use these potatoes for the purpose of feeding his livestock, and they remained government property until he had used them for that purpose, and this language of Form 111, the title shall not pass, there isn't a reservation of title; it's a provision that it shall not pass until the potatoes are delivered or fed to the livestock, and where they're turned over at the nominal sum of 10 cents a hundredweight, these No. 1 U. S. potatoes, worth on the market over \$2.00 a sack, and they're turned over at 10 cents a hundredweight, I don't think you can call this or regard it as a conventional transaction of sale and purchase to which the authorities cited by counsel would properly apply, and I think under those circumstances that it might well be said that the government continued [191] to own these potatoes within the meaning of the controlling section here until they were used for the purpose for which they were delivered to Mr. Williamson.

The government wasn't selling potatoes for 10

cents a sack; it was letting somebody use them at that nominal figure for a purpose which was in line with the government's agricultural program.

Now, I confess that in view of the wording of this section and the transaction here as set up by these documents, the effect of it is not by any means free from doubt; it is a close question, and it's one on which something can be said, or much can be said, on both sides. I'm aware of the logic and force of Mr. Robinson's argument. I think it all depends upon how you look at this transaction, and whether we're permitted to take the broad view of it that I have suggested here in a criminal prosecution is, to say the least, doubtful, but I think in view of the situation where I have a jury waiting and the case on trial, I think I prefer to reserve my ruling on this; I'll deny it at the present time, and when it's renewed at the close of all the testimony I will, unless persuaded differently at that time, will reserve it until after the jury has returned its verdict, and submit the case to the jury, but for the present the motion for judgment of acquittal will be denied. Are you ready to [192] proceed, then, Mr. Robinson?

Mr. Robinson: Yes, your Honor.

(Whereupon, the following proceedings were had within the presence of the jury.)

CHARLES F. WILLIAMSON,

recalled as a witness on behalf of the defendant, having been duly sworn, testified as follows:

(Testimony of Charles F. Williamson.)

Direct Examination

By Mr. Robinson:

Q. Mr. Williamson, I think you said you live at Sunnyside? A. Yes, sir.

Q. And your occupation is a farmer?

A. Yes, sir.

Q. How many acres do you farm, Charley?

A. 800, me and my two boys.

Q. Is that all cultivated land, or is that range?

A. No, it's some irrigated pasture land, and farm land.

Q. Do you know Melvin Waller?

A. Yes, sir.

Q. How long have you know him, Charley?

A. About two years.

Q. Are you neighbors?

A. Yes, sir; live right across the railroad track from one another.

Q. Yes. Directing your attention to Sunday, August 22, did you have a conversation with Melvin Waller on that day? A. Yes, sir. [193]

Q. Did you give him some instructions with regard to hauling some potatoes? A. Yes, sir.

Q. Did you have a conversation with regard to whether he should haul some for himself?

A. Yes, sir, I told him to haul some out for me and some for himself. He had a bunch of cattle, and I did. I said take some for himself, and some for me. He only had a small bunch of cattle, and I get most of the spuds anyway.

Q. You said you're neighbors?

(Testimony of Charles F. Williamson.)

A. Yes, and hes' got his shop in Sunnyside right between our two ranches, we go right by the shop to go up to the Roza ranch; I stop in to get stuff fixed, on Sundays, when they ain't open, and if I don't stop, they'll stop me; I just can't seem to get by there.

Mr. Erickson: I move those remarks be stricken.

The Court: Yes, they're not responsive.

Q. Are you friends, or just acquaintances?

A. We're friends; we neighbor back and forth—

The Court: You've answered the question now.

Q. What is the basis for your acquaintance?
What transactions have you had back and forth?

Mr. Erickson: To which I object as immaterial to the issues in this case.

The Court: Well, I'll permit him to answer this.

A. He borrows my equipment, and we exchange equipment back and forth; I get his trucks, and he gets my tractors, and then I get tires from him there at wholesale, and I sell him hay, and he helps me haul, and I help him haul, and I've got a big tarpaulin of his now, and anything I've got, he's always welcome to it, because I know he'll make it right. I go and get stuff from him.

Q. By reason of your friendship could Mel Wal-
ler possibly steal anything from you?

A. No, sir.

Mr. Erickson: Object to that.

The Court: Don't answer the questions until they're ruled on. I'll sustain an objection to that, and order that it be stricken from the record and

(Testimony of Charles F. Williamson.)

the jury instructed to disregard it. That's a conclusion of the witness, and not proper.

Q. Charley, during the period of time that you've known Mel Waller have you had occasion to meet other people who also knew him? A. Yes, sir.

Q. During that time have you heard other persons speak about him? A. Yes, sir.

Q. Do you recall ever having heard anything said about Melvin Waller that reflected on his honesty and truthfulness? [195]

The Court: Just a moment; that's clearly not the way to present character evidence; you know that. I'll sustain an objection to that. If you want to ask him about his reputation, that's all right; is that what you intended to do?

Mr. Robinson: My understanding is, asking if he knows the general reputation, and whether it's good or bad, if he knows about it, that he can also testify that he has never heard anything to the contrary.

The Court: I've ruled on that, Mr. Robinson. I don't think that's the proper way to examine a character witness.

Q. Are you familiar with the general reputation of Melvin Waller as you've observed it in your community as to his honesty? A. Yes, sir.

Q. What would you say is the general reputation of Melvin Waller as to his honesty?

A. It's good.

Mr. Robinson: That's all.

(Testimony of Charles F. Williamson.)

Cross-Examination

By Mr. Erickson:

Q. How long have you lived in that community?
How long have you lived there?

A. I've been living there steady for two years,
in Sunnyside. I bought there about four years ago.

Q. Have you heard Melvin Waller's reputation
for honesty and integrity discussed?

A. Yes, sir, I've heard different people talk
about it.

Mr. Erickson: I will desire to retain Mr. Wil-
liamson in the Court. I wish to question him further
on some phases of his character testimony later, but
I don't feel free to ask any questions now.

The Court: You'll have that privilege.

Mr. Robinson: No objection.

The Court: You'll have to remain in attendance
until you're excused; you'll have to wait outside.

(Whereupon, there being no further ques-
tions at this time, the witness was temporarily
excused.)

MELVIN E. WALLER,

the defendant, called as a witness in his own behalf,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Robinson:

Q. Your name is Melvin E. Waller?

A. Yes, sir.

Q. You're the defendant in this action?

(Testimony of Melvin E. Waller.)

A. Yes, sir.

Q. Where do you reside? A. Sunnyside.

Q. How long have you resided there now?

A. Since December, 1945. [197]

Q. Where were you before that?

A. For four years prior to that I was in the service, in the Army.

Q. Were you commissioned while you were in the Army? A. Yes, sir.

Q. How long were you overseas in the Pacific Theater, Mel?

A. It's difficult, I'd have trouble remembering that, but I'm sure it was 44 months.

Q. Are you married? A. Yes, sir.

Q. Have you any children? A. One child.

Q. What is your occupation?

A. I own stock in the Herrett Trucking Company, a corporation; I'm the president of that organization.

Q. Who are the other officers in the corporation, Mel?

A. I have a brother Homer, I have a brother Edwin, and Kenneth Robinson.

Q. Where is the location of the business?

A. It's located on the main street of Sunnyside, generally referred to in Sunnyside as 6th and Grant.

Q. What is the main street of Sunnyside going north and south? A. 6th street.

Q. How far are you from the main intersection in Sunnyside? A. Two blocks. [198]

(Testimony of Melvin E. Waller.)

Q. Do you know how large the population of Sunnyside is?

A. I don't know exactly; about five thousand.

Q. Generally, what property does the Herrett Trucking Company utilize in its operation?

A. We lease a corner lot on 6th and Grant, the northeast corner. We lease a lot across 6th street from that, it would be the northwest corner. and then we have purchased a piece of property adjoining that piece of property on the corner of Grant that we lease, that's on 5th and Grant.

Q. Does that last named property have a shack on it, kind of a house?

A. Yes, it's a small place, formerly occupied by a saddle manufacturer.

Q. Now, in what kind of activities was the Herrett Trucking Company engaged in August, 1948?

A. We moved many commodities; we're transportation people, short and long distance, agricultural commodities, cement, lumber, just general hauling, inter and intra state.

Q. Is that time of the year a busy time or a slack time?

A. It's quite a busy time, it's a very busy time.

Q. What hours of work were involved during that period last summer?

A. Well, the trucking business in that season is a 24-hour operation.

Q. Are there any regular hours of work for you or any of [199] your employees?

A. No, sir.

(Testimony of Melvin E. Waller.)

Q. You say that you're the president of the company? A. Yes, sir, that's right.

Q. There are three others that have owned the corporation with you? A. That's true.

Q. No other stock held by anyone else involved?

A. No one else, no sir.

Q. With reference to the equipment of the company, when any of you desires to use that equipment for personal service, how is it handled in your company?

A. We never do split hairs in that matter; if someone wants to use a piece of equipment for personal use, the only thing the corporation asks in fairness to the other members is that it doesn't cost the corporation for the gasoline, oil, and wages or whatever actual obvious expenses might be incurred.

Q. Do you run any such use as that through the books as a haul or trip?

A. No, sir, it's purely a personal matter.

Q. Now, do you live on a farm down near Sunnyside? A. Yes, it's south of Sunnyside.

Q. About how far?

A. Two and a half miles. [200]

Q. Two and a half miles south? A. Yes.

Q. Did you have any livestock on it in August, 1948?

A. Yes, sir, I have some White Face stock.

Q. What kind, how many animals did you have?

A. I don't remember at this date, but it was between 35 and 45; 40, perhaps.

Q. Where is your farm located with reference

(Testimony of Melvin E. Waller.)

to that that Charley Williamson actually lives on?

A. I'm just exactly directly west of Charley Williamson's farm, adjoining it.

Q. How long have you known him?

A. Two years; about two years.

Q. What is the extent of your friendship with Charley Williamson?

A. That varied; it has gone into many phases. I don't know how far to go ahead and answer that.

Q. What kind of transactions have you been engaged in together?

A. We have—I've purchased quite a few things to support my cattle arrangement from him, in the matter of hay, grain; I've used his trucks and tractors; he has various small trucks and tractors, and we have the larger things, tarps back and forth, a hay fork, small things and large, and we've traded cattle, I've purchased some from him, he's [201] purchased some from me.

Q. Do you have any borrowing transactions?

A. Oh, yes, indeed. That goes on all the time. It's a little unusual, I guess, perhaps; I don't know if it is among people that know one another, live that near, but I can take from him what I want to, even though he might not be there, and he takes from me what he needs; there's just never any doubt about an honest, square settlement with Charley at a future date.

Q. Has he borrowed from you while you haven't been around your house, taken property away without you seeing it?

(Testimony of Melvin E. Waller.)

A. Yes, sir. I discovered just a few moments ago——

Mr. Erickson: That's objected to.

The Court: I think we'd better not go into detail; that might take a long time.

Mr. Robinson: Well, the relationship is pretty close. I'll ask the same question I asked Mr. Williamson; I don't want to be criticized by the court——

The Court: Well, the jury may retire; you may make your offer of proof.

(Whereupon, the following proceedings were had without the presence of the jury.)

Mr. Robinson: Your Honor, I offer to prove by this witness that if permitted to answer, he would testify that the relationship of friendship is so close between the two [202] that it wouldn't be possible for one to steal from another.

The Court: There's an objection, I suppose?

Mr. Erickson: Yes, I object.

The Court: I'll sustain the objection. Have you any authority that friendship could be so close that there couldn't possibly be larceny between two people?

Mr. Robinson: No, I don't think I could cite any cases on it offhand.

The Court: I'd hear them if you have them. I have some pretty close friends, but none so close they couldn't steal from me. I think we'll take a short recess.

(Short recess.)

(Testimony of Melvin E. Waller.)

(All parties present as before, and the trial was resumed.)

(Whereupon, the following proceedings were had within the presence of the jury.)

Direct Examination (Continued)

By Mr. Robinson:

Q. Mel, prior to August 23, Monday, August 23, 1948, had you and Charley Williamson discussed feeding of livestock?

A. We may have discussed something about it, I don't recall; just prior to August 23?

Q. Yes, prior to Monday.

A. I think he may have mentioned something about it; I just absolutely didn't believe it, didn't want to chance it.

Q. Didn't want to chance what? [203]

A. Feeding potatoes; I had heard that they would choke stock if you weren't there. I know I wouldn't have carried a discussion of that nature very far at that time; I hadn't tried them.

Q. And did Charley Williamson try to get you to feed potatoes?

A. Yes, he mentioned it frequently, told me what fine food they were, and told me they were good stock feed.

Q. Now, with reference to Charley Williamson on August 23 and 24, what did you know about the exact extent of Williamson's potato farming activities?

(Testimony of Melvin E. Waller.)

A. Oh, nothing particularly. I knew that he was in some manner involved with the government, it could have been the state or the county, I didn't know, in some kind of a program.

Q. Did you know that at that time that he was delivering potatoes at Sunnyside to the sorting houses?

A. I presume I knew it. I was aware of it. I couldn't have said where he was delivering them, or anything of that nature.

Q. That's prior to your conversation with him on Sunday? A. That's right.

Q. Now, at that time had you raised any commercial potatoes on your own place at all?

A. No, I never did raise any potatoes.

Q. Not suitable for it. Prior to August 25, 1948, had you [204] ever purchased any potatoes from the government? A. No; no.

Q. Before August 24 did you have any knowledge that the government was selling potatoes to processors and stock feeders?

A. Not prior to the 24th, no.

Q. Did you get some information on the 24th, or about that time, about the program, about the sale of potatoes?

A. Yes, I did. I talked to several people about it, including Mr. Williamson, Charley Williamson.

Q. Did you get any information that the government claimed to own the potatoes after it sold them for stock feed and they had been sold and paid for and delivered?

(Testimony of Melvin E. Waller.)

A. No, I didn't know anything about that.

Q. When was the first time you ever saw any contract papers with regard to the potato purchase program, Mel?

A. I think it was—in fact, I know it was during the close association Mr. Spaulding of the Federal Bureau of Investigation and myself had; he showed me a copy of the contract, showed me what I had signed; he assumed that the contract made with my brother was one that I had signed.

Q. He showed you a copy of the contract. That was in the latter part of September, is that correct?

A. A blank copy, yes, the latter part of September, sometime in September, I don't recall the dates. [205]

Q. Had you ever seen any of the contract forms before that time?

A. No, that's the first time I had seen the contract forms.

Q. Prior to your transaction with Charley Williamson had either you or your firm ever hauled any of these potatoes sold by the government for feeding and processors?

A. I'm sure we never did. I am not aware we ever did any of that kind of hauling.

Q. In August, 1948, did you have a direct financial interest in some other potatoes?

A. Yes, I have a brother-in-law, Kenneth Hathaway, that farms down near Prosser and processes his potatoes near Granger.

Q. What quantity of potatoes was he growing?

(Testimony of Melvin E. Waller.)

A. As I recall it, he had in fifty acres of potatoes on the Roza.

Q. What was your interest in those potatoes?

A. My brother-in-law is not a very forward individual, and he didn't have any outlet for these potatoes he was growing, and they were about ready to come off, and he borrowed some money from me to commence harvesting with, with the statement that later when they came off he and I could work out some sales program and probably a profit-sharing arrangement.

Q. Had those potatoes been delivered or marketed by August 23?

A. Just dug a few, just a sample, one Sunday I was at his [206] place.

Q. Were those potatoes under any subsidy program of the government?

A. Oh, I don't think so.

Q. Now, with reference to Charley Williamson again, prior to Sunday, August 22, 1948, I assume you knew Charley Williamson was delivering some potatoes in Sunnyside?

A. Yes.

Q. What was the conversation you had with him on that Sunday, Mel?

A. I believe Charley contacted me by 'phone and told me that he was stepping up his potato digging program, that all of his trucks were tied up in transporting potatoes from the field to the local warehouses, and wanted to know if he could use one of our heavier units, you know, that would haul more, for transporting the potatoes from the ware-

(Testimony of Melvin E. Waller.)

house to his place, his feed lot. I think he told me, I'm thoroughly familiar with the arrangement there, and he explained the location of it, I had never been there, but I knew just about where it was, and the access roads; he went to quite some length on the 'phone to tell me that I should be feeding some of these potatoes, that they were good, that he had dumped a lot of them at his place and his cows were just doing real well on them.

Q. Was there anything said about the sacks or about details [207] on it?

A. Two things he was very specific about. One was that we should be at the Simmons Warehouse at 7 o'clock in the morning, and the other was, be sure and have the empty sacks back on the truck, because I believe he told me he was going to change warehouses, and he wanted to clean up that whole deal.

Q. Did you discuss with him at that time whether some of the potatoes would be hauled to your place or hauled to his place?

A. Well, he insisted that I take some to my place, and I didn't tell him I would or wouldn't; the thing was left open, and certainly I could have gone to my place with them, or I could have gone to his. The main thing he wanted was to remove those potatoes from the Simmons Warehouse on the following Monday morning.

Q. Now, what action did you take to comply with his request, Mel?

A. One of the men, he was a little shorter in our

(Testimony of Melvin E. Waller.)

employment than some of the rest, came by on that Sunday afternoon, and I sent him up with one of the flat bed semis, explained to him to be at the Simmons Warehouse the following morning, and told him what unit to use, and so on.

Q. Was this transaction one that you were handling personally with Charley Williamson, or did it involve an official haul [208] by the Herrett Trucking Company for Williamson?

A. No, I'm the only one that has any farming associations, and it was my deal purely.

Q. Your relation to him is closer than anyone else in the organization, is that correct?

Mr. Erickson: That's leading.

The Court: Sustain the objection.

Q. Did any of the other members of your organization know Mr. Williamson very well?

A. Oh, they knew him, because he had been in our place so many times, but when he came in it was always me he asked for; it was just a greeting, and that's about all, if I didn't happen to be there, I think.

Q. You say one of the drivers came by? Which one was it? A. Adamson, Robert Adamson.

Q. Came by on Sunday? A. Yes.

Q. And you told him to do what?

A. Told him to prepare one of the semi-trailers, and I designated the one, big flat bed unit, no side boards or anything; told him to service that, gasoline and make sure the rubber was ready to go, and

(Testimony of Melvin E. Waller.)

be at Simmons warehouse at 7 o'clock the next morning.

Q. Did you tell Adamson anything about how to load the potatoes? [209]

A. No, I felt it was too short a haul to make any difference; he might have it all in the middle, or how it was, if he could only get 200 sacks on, it was all right; it was just a short job, and I didn't outline his program for him.

Q. What did you tell him about the destination of the truck after it was loaded?

A. It would have been difficult to have explained just how to get to Williamson's pasture, and I told him to bring the truck by, after he had loaded it, I would be there, and measures would be taken to unload the truck after he had loaded it.

Q. To bring it by where?

A. By Herrett Trucking Company, and park it, come in and see me.

Q. Now, had you or your organization hauled potatoes before?

A. Oh, yes, lots of potatoes, but no potatoes on just flat racks.

Q. How do you usually haul potatoes?

A. We normally, oh, 95 per cent of the time, I'm sure, haul them in vans. The shipper asks that protection, you know, sun scald, you know. Occasionally we hauled them in our units that have side boards similar to stock racks, and then we cover with tarps to protect against the sun and wind.

(Testimony of Melvin E. Waller.)

Q. Do you haul any sacked commodity on flat bed trucks? [210]

A. Just cement.

Q. In what form, what container?

A. In bags, 100—95 pound bags.

Q. Did your driver Adamson know the practice used in preparing any sacked item for a long distance haul on a truck?

A. Oh, yes, he'd been with us long enough to know our general operating procedure.

Q. Now, during the day on August 23 did you see the potatoes that were being loaded on the truck?

A. I couldn't understand why the truck hadn't come by sooner, I just missed it, and I drove down in my car as I was going home to lunch, drove out of my way down to the Simmons Warehouse, and Adamson was on the trailer, about half or two-thirds loaded.

Q. How far is the Simmons warehouse from the Herrett Trucking Company office?

A. Six or seven blocks.

Q. Did you have any conversation with him regarding the loading?

A. I asked him what the tie-up was, why he wasn't getting loaded faster, and he told me that the potatoes were coming out quite slowly, it was only the potatoes sent in by Williamson for processing that were coming out, and I also asked him why he was covering the load with the tarp, and he said he was covering it in order to haul the potatoes, to [211] keep them from falling off. He was stacking

(Testimony of Melvin E. Waller.)

them very high and making a bigger load than I thought he should on a flat bed.

Q. Do you remember how high he was stacking them? A. Oh, must have been five high.

Q. That's five sacks one above the other?

A. Yes.

Q. Did you get out of your car when you were down there, at all?

A. No, just drove up, I was headed the opposite way he was, looked out the left window, and I spoke from the window of my car.

Q. Went on with your car, did you say?

A. Yes, from the window, just looked out the window of my own little coupe.

Q. What followed on Monday regarding that truck? Where was it taken to after it was loaded?

A. Oh, sometime, as I recall it, about 5 o'clock, Adamson brought it by the Herrett Trucking Company, stopped out on 6th Street; I don't recall if he let it sit on 6th Street, or if I had him pull up around on Grant; I guess he pulled around on Grant Street and came in. We were, you know, quite busy preparing other trucks to go out and load, for long trips, you know, general servicing; I didn't have anyone there I could send out, I couldn't get [212] away at that moment, and being kind of a personal arrangement, I didn't want the company to be furnishing high priced truck labor to unload potatoes, and I asked Adamson if he could stick around a while, I might go with him, and he says his wife wanted to go somewhere, or wanted the car, he lives

(Testimony of Melvin E. Waller.)

at Grandview, and I said all right, and you be back tomorrow morning and take that same piece of equipment and do the same thing with it.

Q. Now, did you have on that same Monday a further conversation with Charley Williamson?

A. I saw—no, I guess he called me on the 'phone again on Monday.

Q. About what time?

A. Oh, it was dusk, it appears to me, about 8 o'clock, I'd assume. He called me on the 'phone and told me that he had one of his own little farm trucks down there with 125 or some neighboring amount of potatoes on it. He said "I know you keep arguing with me about these potatoes, you don't want to take that big load; I'd like to get you to feeding those," inferring that if I fed them and found them all right——

Mr. Erickson: I object to what he's inferring.

The Court: Yes, sustain the objection. Just what he said.

Q. Just what he said. [213]

A. He said I should be feeding potatoes to my stock, and to come down and pick up that little farm truck of his, that he was going on about some other business, and he would let it sit there loaded. He said there were that many more that had been run that day than this load of Adamson's had taken away; so I think as I recall it I took that truck and parked it near Herrett Trucking Company, and asked Homer if he would give me a hand that evening. I told him I had two loads I wanted to throw

(Testimony of Melvin E. Waller.)

off. We went home to eat dinner that evening, it must have been 9 o'clock, and came back, and Homer and myself were just ready to pull away, we had completed our work at the office and shop and had all the trucks that were scheduled for movement that night serviced and ready to go, the drivers told what their orders were, and Homer and I were just ready to leave to go to my place, filled the gasoline lanterns, and Sanders came by in his car.

Q. You mentioned you were getting trucks ready to load. What is the usual arrangement with reference to trucks going out on long hauls in the commercial trucking business activity that you carry on?

A. Most of those truck movements are made at night through the hot part of the season, summer like that, a great many of those commodities are loaded at night from the warehouses, that afford more protection than one of those [214] vans do, you know, for these fresh vegetables.

Q. What percentage of cross-state or longer trips would you say was commenced at night in the month of August, 1948?

A. Oh, almost all those trips were commenced at night; 90 per cent I think is a fair figure.

Q. Most of the trucks run at night on the long hauls?

A. Yes, indeed.

Q. Now, referring again to what you did on the evening of August 23, you say you went to dinner and then you came back and you and Homer were about ready to go, and somebody came up?

(Testimony of Melvin E. Waller.)

A. No, there was work at the shop, I think about an hour and a half work, we ate a very hurried meal, as you do when our wives have the food prepared for us, finished the work concerning the Herrett Trucking Company, then as a personal request to my brother Homer I asked him if he would help me unload this load of Williamson's out at my place, I mean the load on the small truck, you know.

Q. The Williamson truck? A. Yes.

Q. And you and he were starting out when somebody else came along?

A. Sanders, one of our drivers, came by at that time in his car; he had a night off, and I guess he was on his way home, and we told him we needed another good man to give [215] us a hand, and he followed us out to my place in his car, and the three of us unloaded those potatoes.

Q. About what time was that?

A. Oh, 11, 11:30, 11:45, we unloaded those potatoes.

Q. Was there anything unusual about loading or unloading at that time of night in your commercial trucking activity? A. No.

Q. Now, what did you discover with reference to these potatoes when you unloaded that load at your place?

A. They were for stock feed, you know; when Charley asked me, his only reference to potatoes was "Do you want to feed these to your cows?" and I was amazed when I commenced pouring these potatoes out. I took a lantern, got down on the ground,

(Testimony of Melvin E. Waller.)

had more bags of them dumped. I had never seen potatoes any finer, and very seldom had we ever been permitted to buy anything as fine in the stores; they were the finest.

Q. What had you thought the potatoes were that were being fed, before that time?

A. Culls, rejects.

Q. Now, at that time what did you decide to do with regard to other of the Williamson potatoes?

A. I had already seen these little dinky potatoes coming out of the ground at my brother-in-law's place, you know, he showed me what the general picture was, how many tons he [216] could expect; I don't know much about it, but he just kind of outlined, when I loaned him this money, what percentage of good potatoes I could expect, I guess in the way of conversation to make the loan feel secure; he told me how much it would cost to put the potatoes through the little warehouse at Granger, and it just didn't look very sensible to me to take potatoes that were so good and throw them to the stock, and then go to all the expense of washing and cleaning and fixing other potatoes to go to market.

Q. What did you decide, then, at that time?

A. The thing that I first made up my mind on was I should take these already washed, clean potatoes, and sell them, and if I needed more potatoes for stock, then the Hathaway potatoes were in the picture; I would at least save the difference in the sorting.

(Testimony of Melvin E. Waller.)

Q. Did you anticipate Williamson would make any objection to that? A. Oh, no.

Q. Why not?

A. Well, I came back after unloading that small load, and got in my car; I knew Charley was hauling lots of potatoes from his place, I had seen the trucks go back loose, no sacks, and he only had about twice as many cows as I had; I drove out to this feed lot of Charley's at night, 11:30 [217] or 12 o'clock.

Q. This was in your car?

A. Yes; I wanted to see if Charley had lots of potatoes.

Q. What did you find?

A. Oh, he really had lots of potatoes, just deep, and the cows milling over them, lying in them, standing on them, just all kinds of potatoes.

Q. Well, now, later in that evening then what did you do?

A. I went back to the garage, to our shop, and I had purchased some salvage grain, and I had some sacks left over from that grain that had been spilled, and I told, I think I told Sanders to take the truck that he normally drove, which was a Federal with a van trailer behind it, and drive to a little building that the Herrett Trucking Company occupied a block from our headquarters, and I would throw some bags in there, and he was to take that truck and follow me, I was going to take another truck and drive out of town, I didn't tell him exactly where, just told him south, so he pulled the truck down there, I opened up this place and threw in a

(Testimony of Melvin E. Waller.)

hundred or so bags of these new grain bags, then I went back, started up the truck that Adamson had loaded, told my brother Homer to check the lanterns and make sure that they were full——

Q. Did you drive out, then, toward the Williamson place?

A. I got lost on the way out there; I had just been out there, [218] but I missed the road by a block.

Q. What kind of a road is that that goes down that pasture?

A. Oh, it's kind of a narrow little road, wide enough for two-way traffic if you're very careful.

Q. Were there some potatoes transferred, then, substantially in accordance with the testimony given before?

A. Yes, I think it's just the way Mr. Carver said, generally, we just bagged exactly 100, as I recall; we poured potatoes out of the Simmons bags, I don't remember what it said on the bags, but it was the Simmons bags that Charley wanted back, and we poured those in the new grain bags. The whole tops of these bags that Williamson wanted back were bad, and besides, he wanted them back, I don't know why, I guess I did find out later why he wanted them back, but we poured out just 100, an even 100.

Q. The next day was action taken to complete the load?

A. Yes; in addition to that 100 we poured out into my grain bags, I carried 40 or 50 bags off of

(Testimony of Melvin E. Waller.)

this flat bed trailer and set in the back, just on the floor in the most convenient way, so we went back to our lot with those 100 bags that had been transferred from one bag to another, and 50 or so bags of the potatoes still in Simmons sacks.

Q. Next day was the load finished out in the van?

A. Yes, just as quick as I could get around in the morning, we were a little bit late, nothing commences in the trucking [219] business until 10 or 11, we always open earlier, but not much of a crew, and I got Sanders and the man that drove opposite him on long trips, you know, the two that drove together on a piece of equipment, Sanders and Smith, and I told Sanders I wanted him to help me finish the load, and told Smith to give me a hand too.

Q. You finished the load out at that time?

A. The following day, yes.

Q. Skipping some of the details, possibly, Mel, did Homer go to Portland on Tuesday, August 24?

A. That trip was all set up. We had quite a little business in Portland. Homer is the Herrett Trucking Company outside buyer, and checks up on any people we're doing business with away from the Herrett; he had a trip scheduled for Tuesday anyway, and I run this in as kind of an extra-curricular responsibility.

Q. What other business did you have set up for him in Portland?

A. Well, as I recall it, some little dispute with the Utility Trailer people, and some parts to secure, and adjustments on breakdowns with Freuhoff, and

(Testimony of Melvin E. Waller.)

Roberts Motors, one of the largest suppliers for trucks our size, to pick up some parts.

Q. What instructions did you give him regarding the load of potatoes, regarding the sale of them?

A. I told Homer, he knew of my brother-in-law, Kenneth [220] Hathaway, anyway, I didn't need to go into long detail to explain he was a potato rancher; I told him I was going to aid Kenneth in marketing his potatoes, this is going to come a little earlier, but I expect to aid Kenneth in selling the rest of the potatoes, but you go down and sell these potatoes in the name of Hathaway Farms, get the highest possible price on them, I don't know the grade, and he certainly didn't, and Sanders and Smith didn't, so I didn't want to put anything on the bags, I didn't know what they amounted to. I told him to let the potato buyers, they'd know whether they were good or bad, and I assume most quick to find if anything were wrong.

Q. When did Homer return?

A. Wednesday, pretty late Wednesday night, as I recall it.

Q. Did he have the check with him that's been referred to here?

A. Yes, he brought that check with him.

Q. It's plaintiff's exhibit 17.

A. That's all right; I don't have to see that.

Q. Now, did you replace with Williamson the potatoes that——

Mr. Erickson: To which we object, that restitution is no defense.

(Testimony of Melvin E. Waller.)

Mr. Robinson: Well, I know that restitution is no defense.

The Court: Finish the question. [221]

Q. —that had been sent to Portland?

The Court: I'll overrule the objection.

Q. Answer it.

A. Yes, sir, I replaced those potatoes.

Q. Mel, have you ever denied loading and transporting these potatoes?

A. No, after I was asked, and when any investigators told me what it was that they wanted, I told them all I knew.

Q. Now, in handling these potatoes did you have any intent to steal them from anybody at all?

A. No, no, I wasn't stealing them; hadn't entered my mind.

Q. Did you have any intent to violate any criminal law with regard to moving or converting them?

A. No, you can be sure I had too much at stake for that; no.

Q. Did you at any time, Mel, intend to steal any property owned by the Commodity Credit Corporation?

A. Oh, certainly not. No. Positively not.

Q. Did you know at that time that the Commodity Credit Corporation claimed to own these potatoes?

A. No; no; first time I knew that was when Mr. Garner came to see us, and spent quite a number of hours in our office, went through records and books; I don't know what all Mr. Robinson made available

(Testimony of Melvin E. Waller.)

to him, but he was certainly to do that. Mr. Garner then came back——

Q. That's Mr. Robinson, your associate? [222]

A. Yes, Kenneth Robinson, the secretary and treasurer of our association. Mr. Garner came back a few hours later in the afternoon with Mr. Williamson, Charley Williamson, in Mr. Garner's car, and the three of us rode to various places——

The Court: What was the question?

(Whereupon, the reporter read the question, as follows: "Did you know at that time that the Commodity Credit Corporation claimed to own these potatoes?")

The Court: I suppose the answer is no.

A. No.

The Court: Ask another question.

Q. Mel, have you previously been convicted of an offense? A. Yes, sir.

Q. What offense? A. Grand larceny.

Q. When was that?

A. I wasn't of age, as I recall it.

The Court: That doesn't answer the question.

Read the question, please.

(Whereupon, the reporter read the last previous question.)

A. In 1933 or 1934.

Q. How old were you then?

A. I was trying to reconstruct the thing, but I was 19 or 20. [223]

Q. Have you any other convictions on your record at all? A. No.

(Testimony of Melvin E. Waller.)

Q. Was this conviction known to the authorities when you were commissioned an officer in the Army in the South Pacific?

Mr. Erickson: Now, to which we object.

The Court: I think that's immaterial. Sustain the objection.

Q. Was your record in the Army entirely clear?

A. Yes, sir.

Mr. Erickson: To which we object.

The Court: Well, that's all right. I'll let him answer that.

Q. Were you decorated while you were in the Army? A. Yes.

Q. For bravery? A. Yes.

Mr. Robinson: That's all.

Cross-Examination

By Mr. Erickson:

Q. You were convicted in 1935, were you not, sentenced May 23, 1935, at Wenatchee, for grand larceny; is that right?

A. I must reconstruct this in my mind. I'm now 34. That would make me 20 years of age, wouldn't it?

Q. I asked you if that's the date you were convicted.

A. To the best of my recollection it was 1934 or 1935, I don't [224] remember exactly. It's been quite a long time. I hadn't exactly anticipated that question.

Q. You were sentenced at that time to not more than——

Mr. Robinson: Just a minute.

(Testimony of Melvin E. Waller.)

The Court: I think that's improper. Sustain the objection.

Q. Now, when you send these trucks out on these hauls you have to have a permit, do you not, when you haul potatoes, from the State Department of Agriculture or Horticulture?

A. We've never had a cash buyer's license; that's a separate association from what we operate on.

Q. You mean when you truck potatoes from one county to another that you do not have to have a permit from the State Department of Horticulture to transport those potatoes from one county to the other?

A. Mr. Garner went into some lengths with me on that, and that's true when something is made a part of our bill of lading, that I hadn't given a thought to.

Q. You hadn't followed that practice before of getting a permit from Mr. Craver or any men in his office, had you?

A. Before what?

Q. Before this offense?

A. No, that had never been necessary; if we loaded a load of potatoes, the inspector was there, inspected the load probably hours or days ahead of the time we picked them up. [225]

Q. Did he write out a permit and give you the permit to take with you, to your driver?

A. I think that was usually made a part of the papers carried from the shipper to the consignee, yes.

Q. You were familiar with that process, were you not?

(Testimony of Melvin E. Waller.)

A. Yes, if I were given time to think about it I could recall it, yes.

Q. Why didn't you go to Mr. Carver for this load you took to Portland, and get a permit from him?

A. I wasn't acting in the capacity of a shipper, I mean of a trucker; I was acting in the capacity of a farmer.

Q. Oh, you were a farmer?

A. I was marketing those potatoes as if I were a farmer, as part of the Hathaway Farms.

Q. You considered yourself a partner to Hathaway, then, for the purpose of these potatoes?

A. In effect that's true.

Q. You considered that these potatoes you took from the Williamson feed lot were raised by Hathaway, therefore you justified that conclusion, so you did not have to get a permit from the State Department of Horticulture?

Mr. Robinson: Object to that as argumentative.

The Court: Overrule the objection, if you can answer it.

A. That comes kind of in the form of putting words in my [226] mouth. I can answer it yes or no. May I hear that question again?

Q. Well, I'll withdraw the question, and ask you hauling these potatoes without a permit because in hauling these potatoes without a permit because in your own mind they were grown on the Hathaway Farm?

A. We know lots about trucking regulations. I

(Testimony of Melvin E. Waller.)

don't know much about marketing regulations or farming regulations.

Q. You made no effort to find out in this case?

A. I missed that.

Q. You made no effort to find out the regulations from the Horticultural Department?

A. No, I think I made no effort to find that out.

Q. Now, on the 23rd of August you state that the first time you were aware of the fact that these number 1 potatoes for stock feed were such good potatoes is when you saw them on your own feed lot, is that correct?

A. That's correct.

Q. You didn't know anything about this load being, having good potatoes that was on your flat bed truck up there near the Simmons Warehouse?

A. No, I wasn't aware of that.

Q. Then why did you keep it protected with tarpaulins and protect it from the sun and wind?

A. That think was done, there's no question but what the tarp [227] was thrown over it, but you can be sure it was not at my direction.

Q. Well, whose direction was it?

A. The loader is a conscientious man, nothing has been explained to him these were for stock feed; in fact, he ended up in helping unload them, the second load, I think he probably didn't know he was hauling for stock feed.

Q. How did you happen to go to your own feed lot at night?

A. I do a considerable work with my hands.

Q. So you went to your feed lot at 12 o'clock and

(Testimony of Melvin E. Waller.)

set up gasoline lights and worked until 3 o'clock in the morning, isn't that right?

A. That's exactly true; not until 3 o'clock in my own feed lot, no; I worked until 11:30.

Q. I mean in the Williamson feed lot; you worked down there later on? A. That's true.

Q. You were transferring the potatoes from branded sacks into plain sacks down there, weren't you? A. Yes.

Q. Well, just when do you sleep?

A. I attempted to bring out a moment ago the trucking business is one that's not too active early in the morning. Almost all functions and things relating to trucking occur in the afternoon, particularly in the evenings and nights. That's [228] not a rule peculiar to the Herrett Trucking Company; that's a part of trucking.

Q. If you were going to transfer these potatoes into plain sacks, why didn't you do it right at your warehouse in town?

A. I didn't know exactly what were in those sacks. I knew that was the logical place to dump those potatoes then, in Charles Williamson's feed lot.

Q. Well, then, why did you dump 100 sacks in the feed lot and bring the rest to town?

A. Because when I arrived there I found they were good, as I anticipated after unloading the ones at my place.

Q. Why didn't you take the 100 sacks and take them back to town too?

A. You mentioned a moment ago that I needed

(Testimony of Melvin E. Waller.)

sleep. I do need sleep; three o'clock was as much time as I could give to that.

Q. You were tired then, so you threw 100 sacks on the ground, and brought 250 back to town, is that right?

A. That's right, 200, something of that nature.

Q. Then you parked that truck in Sunnyside, and you knew at that time it was going to Portland, so you protected it with a tarpaulin?

A. No, they were in the van, parked there in the most normal of natures. [229]

Q. Well, how come you drove the van down there to the feed lot if you didn't know before that you were going to move these potatoes into the van?

A. I knew that some of them were good; I had looked at a few of the sacks; I unloaded this whole load on my place, and knew they were good. I knew I was going to do some sorting if necessary.

Q. So at the time you drove the empty truck down to the feed lot you knew then that you were going to take some of those potatoes back, didn't you?

A. That's the reason I put the grain sacks in.

Q. Then when you got back to Sunnyside you had room for about 100 sacks more, almost 100 in that van, didn't you?

A. We had a total of 320; it would have been in that neighborhood, yes.

Q. What was the capacity of that van?

A. Normally 16 ton, 320 hundred pound bags.

Q. And you gave directions to get some other number 1 potatoes to complete that 16 ton?

(Testimony of Melvin E. Waller.)

A. I had already told the driver when he came in Monday afternoon to go on home, do whatever he wanted to with his wife, and be prepared to haul more potatoes the following day, under the same arrangement.

Q. And did your drivers tell you when the load was complete? A. What drivers? [230]

Q. Well, your truck drivers, tell you, or your employees tell you, when you had your 323 sacks on the van, or how did you know that the 323 sacks were on the van?

A. I worked shoulder to shoulder with the two drivers. I was there during every part of the operation.

Q. Where did the rest of these potatoes come from, the Pasco Growers?

A. Well, you may call it Majonnier's.

Q. And you poured them out of the branded sacks into the plain sacks too?

A. That's right, and made up 323 bags.

Q. So that every one of the 323 bags was a plain bag? A. Every one.

Q. And the reason you, of course, put them in plain bags was so nobody could tell where they came from? A. No, that was not the reason.

Q. What was the reason?

A. Williamson made it very clear he wanted those bags back. I knew I was going to sell these potatoes. If he wanted his bags back it wasn't up to me to argue; there were two things he mentioned, the time the truck was to be there, and he wanted the bags back. I didn't argue with him or carry it further.

(Testimony of Melvin E. Waller.)

Q. You gave your brother Homer directions to sell these potatoes in Portland? [231]

A. Yes, I did.

Q. And you got the check? A. That's right.

Q. And you endorsed the check?

A. That's right.

Q. Why didn't you put your name on the check?

A. I had permission from Kenneth Hathaway to endorse that check as Kenneth Hathaway; the check had been made out to Hathaway Farms, had it not?

Q. Yes, it's made out to Hathaway Farms.

A. Wouldn't it be difficult for me to sign that check by putting my name on it?

The Court: Just answer the questions.

Q. You didn't put your own name on for identification?

A. Oh, I don't think that was necessary.

Q. The proceeds for that check were put in your pocket?

A. I took the proceeds from that check back, it was quite a long time after the issuance of that check until I cashed it, I don't remember what length, but the proceeds were taken back, we have a little square safe in the office, after I had paid the drivers and reimbursed the Herrett Trucking Company for the gasoline, I put the rest in an envelope, and it lay there quite a long time. Eventually it went right directly to me.

Q. It went where? [232]

A. To me. Into my pocket, as you state.

Q. You made no record on the books of the Her-

(Testimony of Melvin E. Waller.)

rett Trucking Company about the receipt of this money? A. No, that's true.

Q. The books of the Herrett Trucking Company didn't show that this van truck ever went to Portland with these potatoes?

A. I don't think the Herrett Trucking Company actually knew it. There were members of the organization that knew it, but it was not a company function, and for that reason it didn't enter the records of the company.

Q. The Herrett Company employees made the trip?

A. They were in the employ of Mel Waller personally at the time they made that trip, and were reimbursed by Mel Waller.

Q. You paid them personally, cash out of your pocket? A. That's right.

Q. You didn't pay them by Herrett funds?

A. No, I'm sure that's right.

Q. You keep no personal books, of course?

A. No.

Q. The record doesn't show on your personal books?

A. No, I'm too small an operator for that.

Q. How much did you pay them?

A. There's a union scale established of \$28.00. Each one of [233] those men drew the \$28.00 scale.

Q. \$28.00 apiece? A. \$28.00.

Q. Who were the two men?

A. J. D. Sanders and R. C. Smith, both of Sunny-side.

(Testimony of Melvin E. Waller.)

Q. Was it a Herrett Trucking Company truck or a personally owned truck, this van truck?

A. No, that was a Herrett Trucking Company truck.

Q. Did you reimburse the Herrett Trucking Company for the use of that truck?

A. Just the gasoline, and paid the drivers.

Q. Didn't pay them anything for the wear or depreciation on the truck? A. No.

Q. How much did you pay the Herrett Company for the use of that truck?

A. The gasoline was figured out; it's normally about 100 gallons. I replaced that.

Q. How much would that be?

A. Approximately \$25.00.

Q. Is that shown on the books of the Herrett Trucking Company? A. I'm sure it is.

Q. Do you have the books available that show that transaction?

A. I hadn't anticipated that question; I didn't bring any books with me. [234]

Q. Have you ever seen that transaction on the books of the Herrett Trucking Company?

A. No.

Q. Did you report it to any officer of the company to incorporate in the books?

A. Yes, I think that was an accepted, well-known fact by the secretary and treasurer, or the bookkeeper, at least.

Q. Who did you report the transaction to?

A. When one of us personally draws gasoline from the——

(Testimony of Melvin E. Waller.)

The Court: Can you answer that question? Read it.

(Whereupon, the reporter read the last previous question.)

A. That's not a question that can be answered with a yes or no or a word. There's an explanation necessary.

The Court: I thought you said you reported it to somebody, and counsel asked you who you reported it to.

Q. Who did you report it to?

A. In the true form of a report, I can't answer that question. There was no formal report.

Q. Well, how did you report it to the company?

A. May I make an explanation there?

The Court: You can answer the questions.

A. The Herrett Trucking Company, when an individual buys gasoline, keeps a record of the amount of gasoline that's charged to the individual, whether it be an employee, I'm [235] an employee of Herrett Trucking Company, and the gasoline was charged to me on a slip of paper in the regular form that hangs on the gasoline pump. The 100 gallons of gasoline that it took the replace that that was drawn out the night that truck filled up, that was all charged to Herrett; when the truck returned I took the truck over, filled it with gasoline, and charged that amount; the tanks are of sufficient size to run it to Portland and back, and charged that amount to myself on the slip that hangs on the pump, and reimbursed the company in the same manner that an individual or employee would pay the company.

(Testimony of Melvin E. Waller.)

Q. You just hung the slip on the pump and left it there; you don't know what became of it?

A. No, it's a slip that holds many names; it's left there until it's full; there's a special place prepared for it out of the weather. It's a business-like arrangement.

Q. Now, you knew that these potatoes were stock food potatoes when you took them to Portland?

A. Yes, I think Williamson inferred that they were stock food potatoes.

Q. Williamson told you that they were stock food potatoes, didn't he?

A. He didn't pin it down to specific stock food potatoes. He said, "Here are potatoes for your cows," in effect.

Q. He never told you to take any of those potatoes to Portland, [236] did he?

A. No. By the same token, he——

Q. No, you've answered the question. Do you remember telling the investigators, the F.B.I. men and Mr. Garner, that you knew that they were government potatoes, and that the government was mixed up with the potatoes?

Mr. Robinson: Just a minute; I don't recall any testimony——

The Court: I think the question is objectionable in that form.

Mr. Erickson: I'll withdraw the question.

Q. Do you remember your conversation with Mr. Garner about stock food potatoes, knowing that these potatoes were connected with the Williamson program?

(Testimony of Melvin E. Waller.)

A. I presume you're asking for a yes there, which again cannot be answered with a yes; there's a qualifying statement goes with it.

The Court: I don't know why it couldn't be; read it.

(Whereupon, the reporter read the last previous question.)

The Court: I'll take that back; you don't have to answer that yes or no. Answer it in your own way, if you wish.

A. Mr. Garner and Mr. Spaulding are well-educated men; they are good investigators, and during the course of this [237] investigation we had to have common ground, we had to call them Williamson potatoes, government potatoes, or by some common name; if we just referred to potatoes it is open to constantly going over the same words. If I referred to those potatoes as being government potatoes, they were merely to identify them as the same potatoes, that we were always in discussion over.

Q. Well, at the time you signed the contract you knew what the price was for potatoes, or had Ed sign the contract, your brother, didn't you, on the 25th of August?

A. Yes, I think I knew the price of those potatoes at that time.

Q. You sent the money up there?

A. That's true.

Q. You knew at that time that the potatoes were sold for stock food, didn't you?

(Testimony of Melvin E. Waller.)

A. At the time that I sent the money up for that——

Q. Yes.

A. ——original purchase on August whenever it was, the 25th?

Q. Yes. A. Yes, I sent the money.

Q. You knew what the price was that you were buying those for?

A. Yes, I knew it was \$2.00 a ton.

Q. And you knew that those potatoes could not be sold into the channels of retail trade, at that time?

A. No, I didn't know that at the time I sent the money.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Robinson:

Q. Mel, with reference to the buying of gasoline that's been referred to, do your employees purchase gasoline from the Herrett Trucking Company, truck drivers and others, for their personal use?

A. We add a cent a gallon to the purchase price of the gasoline, and sell it to the employees and individuals of the concern.

Q. You get a reduction that way?

A. Four cents a gallon.

Q. Explain again the procedure you follow to keep track of that.

A. You want to know the particular case of this 100 gallons?

Q. No, the general procedure you follow.

A. We keep locks on the pump, of course, and

(Testimony of Melvin E. Waller.)

they're constantly locked. The first thing you do, naturally, is unlock the pump, then put the gallons of gasoline in the vehicle; there's no attendant there; each employee is trustworthy; he places the amount of gasoline in there, then there's a slip in a weather-proof case that hangs near each pump; the employee goes to that, marks down the date, his name, after it the amount, and there's a meter reading, a constant rotating meter, and marks the meter [239] reading on that; then at the end of the week when his account is straightened up, we make a check for his regular wages, and then we make one for whatever draws he has, including gasoline.

Q. With reference to the check to Hathaway Farms, at the place you cashed that check were you known to the folks there?

A. Oh, very well, very well.

Mr. Robinson: That's all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the defendant was excused as a witness and resumed his seat with his counsel.)

Mr. Robinson: Your Honor, so the character witnesses won't have to come back tomorrow, I thought we might call some of them at this time, since I think counsel won't have any difficulty with his cross-examination now.

The Court: Yes, all right. By the way, I wonder if you couldn't recall Mr. Williamson now for whatever question you want to ask him?

Mr. Erickson: Yes.

CHARLES F. WILLIAMSON,

a witness on behalf of the defendant, resumed the stand and testified further as follows:

Further Cross-Examination

By Mr. Erickson:

Q. Mr. Williamson, you stated that Mr. Waller's reputation [240] for honesty and integrity was good in the community. Have you heard his reputation discussed? A. Yes, sir.

Q. And over how long a period of time has his reputation been discussed, that you know about?

A. Well, all I know is what I've heard in the last couple of years.

Q. Have you heard it discussed that he has been convicted of a felony?

A. I heard when he was a kid he got in a little jam, but there was thousands of kids that done that.

Q. Do you know what a felony is?

A. Yes, sir.

Q. What is it?

A. Well, if you happen to take something that ain't yours, or something.

Q. You don't know the difference between a felony and a misdemeanor? A. What is it?

The Court: I don't think that's a fair question; no layman would, probably. I'll sustain an objection to it.

Mr. Erickson: That's all the questions I have.

(Whereupon, there being no further questions, the witness was excused.) [241]

Mr. Robinson: Call Mr. Grimm.

The Court: Is this another character witness?

Mr. Robinson: Yes, your Honor.

The Court: I think I'll ask the jury to step out a minute. They should relax and stretch a little anyway.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: The reason I asked the jury to step out, it's always been my understanding that in calling character witnesses, that the accepted method is to ask the witness if he knows the reputation of the defendant in the community in which he resides for the trait in issue; perjury would be truthfulness, and in a case of this kind it would be the honesty, and counsel has indicated he has some authority you can put a witness on the stand and ask him if he's ever heard anything bad said about a defendant. That's a new one on me.

Mr. Robinson: Well, your Honor, the reference is a recent edition of Abbott, Criminal Trial Practice.

The Court: I wonder if counsel hasn't this in mind, that after the accepted method has been followed, and you ask a witness first if he knows the reputation, he says yes, you ask him if it's good or bad, then if inquiry is made as to why he thinks it's good, he says he never heard anything bad about him. I've never heard it done where you ask him in the first instance if he has heard anything bad.

Mr. Robinson: I might say, your Honor, I never followed the practice I used today, because I've always followed the procedure in state courts. However, a recent edition of Trial Practice that we

have uses the question and answer form exactly as I used it.

The Court: Is that Moore's Federal Procedure?

Mr. Robinson: No, Trial Practice.

The Court: Who wrote the book?

Mr. Robinson: I don't have the edition here; I just wrote the question and answer down. Mr. Salvini and I examined it, with some surprise, I might say, in this Criminal Practice book, which is Abbott. The quotation, and possibly it ties in to a question after the question to which your Honor referred, that is, the good or bad, is this: "It is now well established that in order to prove the good character a witness may testify that he has never heard anything said against his character or reputation, or that he has never heard the matter discussed, provided the witness has been in a position that he would probably have heard the matter discussed." I don't hold any brief for this, and I was surprised. We're not going to follow a procedure your Honor thinks is improper, so there won't be any argument about it.

Mr. Erickson: May I ask a question? I'm not quite [243] clear on what the Court's ruling is on showing the length of the sentence, the time served on the felony charge; is that permissible?

The Court: Well, there is, I'll say, a difference of opinion about it, and not consistency of practice in the Federal Courts even in this state. In the state courts the rule is that you may show that any witness who takes the stand, and of course that includes the defendant, that you may show by

way of impeachment, to affect his credibility, that he has been convicted of a crime. It's been my understanding that in Federal Court the rule is you must show he's been convicted of a felony. Under the laws of this state any violation is a crime; exceeding the speed limit would be a crime. I've adhered to the rule that in Federal Court you may show he's committed a felony, and I think there is some disagreement as to whether you can show the character of the felony, but it seems to me the better reasoning is you can show the character of it, because the very purpose of it is that the witness is less worthy of credit because of the conviction, and the character of the offense would have a great deal of bearing; the one that would most discredit the witness, I think, would be a conviction of perjury; and there are crimes of violence that might not discredit the witness at all. The character of the offense has a great deal to [244] do with the weight the jury should give to it. Beyond that, I don't think it's proper to show what punishment was imposed, that he was sentenced to five years, or two years, or whatever it may be. One defendant may have been given a very severe sentence, another a light one. It might be argued that would have some bearing, but I think it's too remote.

Mr. Robinson: I have been prevented from showing it was a suspended sentence on occasion, your Honor.

The Court: Yes. I think it's not at all a universal practice, but I think the majority of courts

probably do not permit a showing of the length of the sentence. All right, bring in the jury, please.

(Whereupon, the following proceedings were had within the presence of the jury.)

ROBERT M. GRIMM,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Salvini:

Q. Will you please state your name?

A. Robert Grimm.

Q. Where do you reside?

A. Sunnyside, Washington.

Q. How long have you resided at Sunnyside?

A. A little over three years.

Q. What is your occupation in that city, Mr. Grimm? [245]

A. I'm assistant manager of the bank, the Old National Bank branch there.

Q. That is the Old National Bank of Spokane?

A. That's right.

Q. How long have you been employed with that bank?

A. I've been with the bank since 1926.

Q. During this time that you've resided at Sunnyside have you had occasion to become acquainted with Melvin Waller, who sits next to me?

A. Yes.

Q. Would you state the basis of this acquaintance?

(Testimony of Robert M. Grimm.)

A. Well, I've had dealings with him in my capacity in the bank, and I've also known him in a social way.

Q. How long have you been acquainted with him?

A. Well, approximately the entire period that I've been in Sunnyside. I think it was just shortly after I was transferred to the branch in Sunnyside that I had my first dealings with him.

Q. Approximately the last two and a half, three years?

A. Well, I'd say probably three years. I've been there a little over three years.

Q. During this time have you had occasion to discuss with others of the Sunnyside community about Waller, who also knew him?

A. Yes. [246]

Q. From these discussions were you able to observe what his general reputation was in the community for honesty and as being a law-abiding citizen? A. Yes.

Q. What was his reputation in the community as you have observed it?

A. Well, I would say he has a good reputation for honesty and fair dealing in business ways.

Mr. Salvini: That's all.

Cross-Examination

By Mr. Erickson:

Q. Is he a customer of yours at the bank? Does he bank at your bank? A. Yes, sir.

(Testimony of Robert M. Grimm.)

Q. How long has he been a customer at your bank?

A. Well, I don't know exactly, without checking the dates, but I would say approximately three years.

Q. He's a friend of yours?

A. Well, yes.

Q. And you're interested in helping him and doing anything you can to help him in this controversy?

A. Well, to the extent of anything that I could say that's the truth is concerned, yes.

Q. Do you know anything about his past?

A. Well, I understand that he was in the service, but I know nothing previous to that. [247]

Q. Do you know that he's been convicted of grand larceny in 1935?

A. No, I didn't know. I heard a rumor the other day, something to that effect, but I don't know anything about it.

Q. Did you hear that discussed in Sunnyside?

A. Not to any great length.

Mr. Erickson: That's all.

Mr. Salvini: That's all.

(Whereupon, there being no further questions, the witness was excused.)

H. W. FARWELL,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of H. W. Farwell.)

Direct Examination

By Mr. Salvini:

Q. Will you please state your name?

A. H. W. Farwell.

Q. And where do you reside, Mr. Farwell?

A. Sunnyside, Washington.

Q. How long have you resided in Sunnyside?

A. Since 1942.

Q. That has been continuously since 1942?

A. Yes.

Q. What is your occupation or business in that community?

A. I'm a feed and seed dealer, retail basis, and manufacturer.

Q. Are you acquainted with Melvin Waller, who is seated next [248] to me? A. I am.

Q. How long have you know Mr. Waller?

A. I've known him since approximately three years. I met him, I would say, within the first week after he arrived in Sunnyside.

Q. And during that time you've continuously resided in Sunnyside, is that right?

A. Myself, yes.

Q. What is the basis of your acquaintance with Mr. Waller?

A. Well, it was first business, because his firm does considerable trucking for me, and also personally, because I know him and have done a lot of dealings and been a lot of places with him, and know him quite well that way.

Q. Have you had occasion prior to last August

(Testimony of H. W. Farwell.)

23 to talk with others who also knew Mel Waller in the Sunnyside community?

A. Oh, yes, because in a little town everybody knows everybody.

Q. Were you able to observe what his reputation in that community was for honesty and truthfulness and being a law abiding citizen?

A. Well, in my business relationship with him and his firm, and he being the head of it, was very close, I found it excellent, and——

Mr. Erickson: Now just a minute; I move the answer be stricken. [249]

The Court: Well, I'll permit it to stand. I don't think you should go into more detail, though. He's got a good reputation, is the gist of it.

Mr. Salvini: That's all.

Cross-Examination

By Mr. Erickson:

Q. You say you've know him since 19—, what?

A. I think he's been there approximately three years; I've known him within a week from the time he arrived, because his trucking firm does considerable work for me in hauling merchandise.

Q. You've heard his reputation discussed among people for honesty and integrity?

A. I could say yes, in a business way, because in business dealings that is very essential.

Q. Do you know that he's been convicted of grand larceny in 1935?

The Court: Just a minute; I think I'll object to the form of that question. Since reputation is in-

(Testimony of H. W. Farwell.)

volved I think you should ask if he's heard anybody discuss it.

Q. Have you heard anybody discuss his conviction of grand larceny in 1935?

A. There was some rumor about it very recently in the town, things like that go around in a town, but rumors are rumors. I heard some rumor about it, after these troubles, after this spud trouble that I'm here for today. We didn't give [250] that much consideration, because when you find a man that will work 12, 15, 20 and 30 hours straight through, that's very refreshing for a man to come back from the Army and work as he worked in his business.

The Court: I think you've answered the question now. Wait for another question.

Mr. Erickson: That's all.

Mr. Salvini: That's all.

(Whereupon, there being no further questions, the witness was excused.)

ROBERT ADAMSON,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Robinson:

Q. State your name, please.

A. Robert Adamson.

Q. Mr. Adamson, where do you reside?

A. I live in Grandview.

Q. Grandview? A. Yes.

Q. Did you reside there last August?

(Testimony of Robert Adamson.)

A. Yes, I did.

Q. Were you in August, 1948, employed by the Herrett Trucking Company? A. Yes, I was.

Q. You've been employed since that date, too, haven't you? [251] A. Yes.

Q. How long have you worked for the Herrett Trucking Company? A. Since June.

Q. Now, directing your attention to the month of August, 1948, what kind of hours were worked by the employees of the Herrett Trucking Company during that month?

A. Well, the hours are very irregular; I mean, you might work part of the time one day and part of the night the next day, anything like that; there was no regular hours.

Q. Were there many night operations and day operations both conducted?

A. Oh, yes; generally we ran from one into the other, or one on to the other; they were combined or separate; you might be working nights or days, it didn't make any difference.

Q. With reference to cross-state hauls with the trucks of the Herrett Trucking Company, did very many of those commence at night?

A. Yes, they did.

Q. What portion of the total hauls, in your estimate, would commence in the late evening?

A. I think most of them would.

Q. Most of them. Now, do you recall loading potatoes at the Simmons Warehouse on August 23?

A. Yes, I do.

(Testimony of Robert Adamson.)

Q. Who directed you to take a piece of equipment to the [252] Simmons Warehouse?

A. Mel; Mel Waller.

Q. When did he direct you to do that?

A. Sunday afternoon.

Q. Sunday afternoon; and he told you to have it there when?

A. It was early Monday morning, I think it was about 6:30, something like that.

Q. What kind of equipment was used?

A. I had a semi-truck trailer, and a semi-trailer, flat bed.

Q. Did that flat bed have any side boards of any kind on it? A. No.

Q. Had you hauled any potatoes before?

A. Yes, I had.

Q. How did you load these potatoes?

A. I loaded them five high and three wide; the sacks were across the bed of the truck.

Q. Five high? A. Yes.

Q. Why did you load them in that fashion, Mr. Adamson? A. I always have.

Q. Had Mel Waller given you any specific instructions with reference to how to load this load?

A. No, he hadn't.

Q. Did you use a tarpaulin of some kind?

A. Yes, I did. [253]

Q. Where did the tarpaulin come from?

A. Well, I had the tarp on the flat bed; I had been hauling cement on that truck, anyway we always carry a tarp in case it rains, you can cover your load, and I used the tarp to cover the spuds to

(Testimony of Robert Adamson.)

hold them on; you put that many potatoes on a flat bed that size, it's the easiest way to put your load on and hold it on and tie it down so you don't lose anything.

Q. You used the way that was easiest to you, did you? A. Well, it was the easiest to me.

Q. Did Mel Waller tell you to use the tarpaulin?

A. No, he didn't.

Q. Did he give you any specific instructions with reference to protecting the potatoes from sun?

A. No, he didn't; he asked me how come I was using the tarp. I told him it was the easiest way I could figure out to tie them on. That's all that was said.

Q. Where did you take the truck after the loading was completed?

A. Down to the Herrett Trucking Company shop.

Q. Did you leave it there? A. Yes, I did.

Q. Why did you leave it there?

A. Well, I went down to get some help to unload it, and there wasn't anybody to help me at that particular time, and I [254] had been working since early that morning anyway, so Mel let me go on home; he said somebody else will unload it that night.

Q. Did Mel Waller give you any instructions about being secretive or careful or concealed in the loading of these potatoes?

A. No; couldn't hardly conceal them on a flat bed, anyway.

(Testimony of Robert Adamson.)

Q. Did you load another flat bed on Tuesday?

A. Yes, I did.

Q. Was a similar procedure followed then?

A. Yes, it was.

Mr. Robinson: That's all.

Cross-Examination

By Mr. Erickson:

Q. Now, you're still employed by the company?

A. Yes, I am.

Q. And all you did was load this flat bed truck; you didn't drive any truck to the feed lot?

A. No, I didn't.

Q. Either the Williamson or the Waller feed lot?

A. No, I didn't.

Q. You didn't drive any truck to Portland?

A. No, I didn't.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.) [255]

J. D. SANDERS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Robinson:

Q. State your name, sir.

A. J. D. Sanders.

Q. And where do you reside?

A. Sunnyside.

(Testimony of J. D. Sanders.)

Q. Are you employed by the Herrett Trucking Company? A. Yes, sir.

Q. How long have you been working for them?

A. Just about a year.

Q. Were you employed by them in August, 1948?

A. Yes, sir.

Q. In and around the time of August 23, 1948, Mr. Sanders, what procedure was followed with reference to the hours worked?

A. There was 24-hour service.

Q. 24-hour service? A. Yes, sir.

Q. What does that mean with reference to the way you worked?

A. Any time of the day or night we were on call, and we run mostly at night.

Q. You ran your trucks mostly at night?

A. Yes.

Q. Did you operate vehicles on cross-state hauls or long hauls? [256] A. Yes.

Q. Why did you start the trips at night, Mr. Sanders?

A. Well, one thing, the trucks would run cooler.

Q. Any other reasons?

A. Well, another thing, we'd be at our unloading place, the destination, at daylight the next morning, or 8 o'clock when they opened.

Q. Is there anything unusual in the trucking business about starting a trip at night?

A. No, sir.

Q. Are loads put on at night in the trucking business, in your experience? A. Quite often.

(Testimony of J. D. Sanders.)

Q. Were you one of the drivers who drove a van truck to Portland with a load of potatoes on the evening of Tuesday, August 24, where you met Homer Waller? A. Yes.

Q. Was there another driver? A. Yes, sir.

Q. What was his name? A. R. C. Smith.

Q. The two of you left Sunnyside on what day, do you recall?

A. It was on Tuesday evening of the 24th.

Q. When you got ready to start out with the load from the Herrett Trucking Company property, did you stop someplace [257] on your way out of town?

A. Not on the way out of town. We stopped at Goldendale to eat.

Q. Before you got out of town did you stop at anyone's house, do you recall?

A. Not that I recall.

Q. With reference to that trip, did Mel Waller at any time caution you or anyone in your presence to be secretive about the load of potatoes that you had? A. No, sir.

Mr. Robinson: That's all.

Cross-Examination

By Mr. Erickson:

Q. How are you paid, Mr. Sanders?

A. For that trip?

Q. No; how are you paid by the Herrett Trucking Company? A. By the trip.

Q. What do you get for a trip?

A. That all depends upon how far we go, sir.

(Testimony of J. D. Sanders.)

Q. What do you get for a trip that goes to Portland? A. \$28.00.

Q. And how are you paid, by company check or by cash?

A. Biggest part of the time it's a company check, yes.

Q. What do you mean, the biggest part of the time? Are you paid in cash some of the time?

A. This time, yes. [258]

Q. Is this the only time you were paid in cash?

A. Yes.

Q. You've always been paid by check before?

A. Yes.

Q. But for the trip of August 25 you were paid in cash? A. Yes.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Robinson:

Q. Did you drive any of the Herrett Trucking Company trucks for any other personal trips for any of the officials of the company besides this one?

The Court: I think the form of that question is objectionable and suggestive.

Q. Did you ever drive a Herrett Company truck on any trip except this one which was not a regular commercial haul?

A. Yes; I hauled some hay from his brother-in-law down below.

Q. Did you for any officer of the company, though, that you remember of? A. No.

Mr. Robinson: That's all.

(Testimony of J. D. Sanders.)

Recross-Examination

By Mr. Erickson:

Q. Just a minute; were you employed by the Herrett Trucking Company to take this truck to Portland?

Mr. Robinson: I object to that as calling for a conclusion of the witness. [259]

The Court: Well, he can answer it if he knows.

A. Well, there wasn't anything unusual about it, except after I got back I was paid in cash.

Q. There was no separate instructions that you were working for a particular man hauling this for a particular officer of the company, was there?

A. No.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Robinson:

Q. Who gave you the instructions about where to go, and when? A. Melvin Waller.

Mr. Robinson: That's all.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

R. C. SMITH,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Robinson:

Q. Your name is what? A. R. C. Smith.

(Testimony of R. C. Smith.)

Q. And where do you reside?

A. Sunnyside.

Q. Are you employed by the Herrett Trucking Company?

A. Yes.

Q. How long have you worked for them, Mr. Smith? [260]

A. About nine months.

Q. Were you employed by them in August, 1948?

A. Yes.

Q. What kind of hours did you work for the company in August, 1948, Mr. Smith?

A. Oh, it was on 24-hour call, any time.

Q. Was that the understanding for your employment during that time?

A. Any time a load is to go out, why, we took it.

Q. Did you drive with J. D. Sanders on a trip to Portland commencing Tuesday evening, August 24, 1948?

A. Yes.

Q. What time did you start that trip?

A. Oh, it was about 10 o'clock in the evening, about; something like that; maybe a little later.

Q. You were on standard time down in Sunnyside then, weren't you?

A. Yes, I believe we was.

Q. Was it unusual to start a trip at night at that time of the year in the commercial hauling business?

A. No, we usually do all the hauling at night.

Q. Usually do?

A. All the hauling at night in the summertime.

Q. I see. Mr. Smith, in making this haul did Melvin Waller at any time caution you or anyone in your presence to be [261] secretive about the trip

(Testimony of R. C. Smith.)

and not to tell anyone about it, or explain or talk about it to anyone? A. No.

Q. Did you receive any tutoring or cautioning whatsoever with regard to it? A. No.

Mr. Robinson: That's all.

Cross-Examination

By Mr. Erickson:

Q. Now, Mr. Smith, how are you paid by the trucking company, by check?

A. Paid by check and cash, both.

Q. How many times have you been paid by cash?

A. Well, quite a few times.

Q. Who directed you to make this trip?

A. Mel.

Q. Melvin Waller? A. Yes.

Q. And were you paid by cash or by check for this trip? A. I'm pretty sure I got cash.

Q. How much did you get?

A. I think it was \$28.00; regular trip.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Robinson: That's the drivers, your Honor. I'll [262] appreciate a recess at this time.

(Whereupon, the following proceedings were had at the bar, out of the hearing of the jury.)

The Court: How many more witnesses do you have?

Mr. Robinson: I think just one.

The Court: The one excused until tomorrow?

Mr. Robinson: No, one besides him. There's two stuck in the snow over in North Bend, Ross Lynch.

Mr. Erickson: They're character witnesses? We have three now, and one in the morning.

Mr. Robinson: Ross Lynch is in a different community.

Mr. Erickson: How many character witnesses does the Court permit?

Mr. Robinson: Unlimited?

The Court: I've never set a number; there's no set rule. I should think six would be ample.

Mr. Robinson: We don't intend to have more than six.

The Court: Usually about three is all we have, but I don't want to limit it too much in a case of this kind.

Mr. Erickson: Could we start at 9:30 in the morning, do you think?

Mr. Robinson: Did your Honor want to get through by noon?

The Court: Well, as shortly after as possible.

Mr. Robinson: Unless there's a lot of rebuttal we'll be through within fifteen minutes or half an hour at the most.

The Court: You'd want an hour on the side at least to argue this, or would three quarters of an hour be enough?

Mr. Robinson: Well, Salvini is going to argue a portion of it; it might be an hour, but not more than that.

Mr. Erickson: We couldn't possibly get through

by noon if we convened at 10 o'clock. We should discuss the instructions a little bit.

Mr. Robinson: 9:30 would be all right with me.

The Court: Yes, I think we'd better, perhaps.

(Whereupon, the following proceedings were had within the presence and hearing of the jury.)

The Court: We're going to finish this case tomorrow, members of the jury, and in order to submit it to you as soon as possible we'll come back at 9:30 instead of 10 o'clock. That's just a half an hour earlier than usual, and we'll have the argument and the court's instructions, and the case will be submitted to you, and of course, I never know, or you don't, how long it will take you to decide this matter, so you'd better come here prepared to stay for the duration, until the case is [264] decided, and tell your folks at home not to worry if you don't get home early. We'll adjourn until tomorrow morning at 9:30.

(Whereupon, at 4:30 o'clock p.m. the Court took a recess in this cause until Wednesday, February 16, 1949, at 9:30 o'clock a.m.)

Yakima, Washington,
Wednesday, February 16, 1949,

9:30 o'clock a.m.

(All parties present as before, and the trial was resumed.)

(Whereupon, without the presence of the

jury, the Court discussed with counsel the instructions proposed to be given in this cause.)

(Whereupon, the following proceedings were had within the presence of the jury.)

S. A. ROSSIER,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Salvini:

Q. Will you please state your name?

A. S. A. Rossier.

Q. And where do you reside, Mr. Rossier?

A. Sunnyside, Washington.

Q. How long have you resided there in that vicinity?

A. Well, I've been residing in and near Sunnyside since 1903; 46 years.

Q. And you do now reside in the city of Sunnyside? [265] A. Yes, sir.

Q. What is your business or occupation in that community, Mr. Rossier?

A. Loans and insurance, principally.

Q. For how long have you been engaged in that business? A. In Sunnyside, you mean?

Q. Yes. A. Since 1943, in Sunnyside.

Q. Do you hold any public office in that community? A. Yes, sir.

Q. What offices do you hold?

A. Mayor of the city of Sunnyside.

Q. Do you occupy any other public office?

(Testimony of S. A. Rossier.)

A. Justice of the Peace in Sunnyside Precinct.

Q. How long have you been Mayor of the city of Sunnyside? A. Going on five years.

Q. And how long have you been Justice of the Peace of the Sunnyside Precinct?

A. Since 1943.

Q. Are you acquainted with the defendant, Melvin Waller? A. I am.

Q. How long have you known Mr. Waller?

A. Since the early year 1946, would be the year.

Q. And since that time you have resided continuously in Sunnyside? [266] A. Yes, sir.

Q. Have you had the occasion to discuss Waller with others in the Sunnyside community who also knew him? A. Yes, sir.

Q. What was the nature and the extent of those discussions, Mr. Rossier?

A. Well, Mr. Waller came to Sunnyside I believe it was the year 1946, and as Mayor of the town, and as being in the business that I'm in, I tried to become acquainted with any new people that's coming into the town. They might some day come to me for business, and I feel that if he's a business man of any consequence, I should become acquainted with him as to his standing in the community. That's been my case. That's about all.

Q. From those discussions or inquiries have you been able to observe what Waller's general reputation is in Sunnyside for being honest and truthful, as a law-abiding citizen?

A. Well, I contacted men that I felt had con-

(Testimony of S. A. Rossier.)

tacted Mr. Waller, perhaps they did business with him at Sunnyside and one or two other places.

Q. What did you observe his reputation, that is, Waller's reputation, to be for truthfulness and honesty?

A. Mr. Waller's reputation in my opinion was—

Q. Not in your opinion, Mr. Rossier, but what did you observe to be his general reputation in Sunnyside as to honesty? [267]

A. It was above reproach. It was good in every respect.

Mr. Salvini: That's all.

Cross-Examination

By Mr. Erickson:

Q. Did you make specific inquiry about Mr. Waller's past reputation?

A. Well, yes, around town and in Sunnyside.

Q. Did you hear the matter discussed that he had been convicted of grand larceny in 1935?

A. I got a rumor of that in the summer of 1948, was the first time that I got that rumor.

Q. That's the first time you knew about it?

A. Yes, sir.

Q. He's a customer of yours, isn't he?

A. He has transacted some business with me, yes, sir.

Q. And you want to help him in any way you can?

A. Well, as long as he was deserving of any assistance, if it was fair and just and equitable, why,

(Testimony of S. A. Rossier.)

I'd be glad to extend him any accommodation I could.

Q. Do you think that in spite of that discussion you heard about his grand larceny conviction in 1935, his present reputation is good?

Mr. Robinson: I object to that, your Honor.

A. Well, no, I did hear it was a rumor I received——

Mr. Robinson: Just a minute, Mr. Rossier. I object to that. In the first place it pertains to his [268] reputation now, which isn't the issue; the second one, "Do you think" calls for a conclusion of the witness.

The Court: I think it's argumentative; I'll sustain the objection.

Mr. Erickson: That's all.

Mr. Robinson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

K. S. PORTER,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Salvini:

Q. Would you please state your name?

A. K. S. Porter.

Q. Where do you reside?

A. About two and a half miles south of Sunnyside.

(Testimony of K. S. Porter.)

Q. And how long have you resided at that location? A. About eleven years.

Q. What is your occupation or business, Mr. Porter? A. Farming and dairying.

Q. Your residence, then, is on a farm, is that correct? A. Yes.

Q. How long have you been engaged in farming?

A. About eleven years, there.

Q. Have you had occasion to become acquainted with Melvin Waller, who is seated next to me? [269]

A. Yes, I have.

Q. How long have you known Mr. Waller?

A. Well, approximately two years, since he moved there.

Q. What has been the basis of that acquaintance?

A. Well, as neighbors, and borrowing a little back and forth, and I've sold him a little hay, and done a little hay cutting for him.

Q. You state you're neighbors. How close is your residence to Waller's residence?

A. Oh, he's across the track and on the opposite side of the road from me.

Q. Prior to August 23, 1948, have you had occasion to discuss with others in the Sunnyside community as to a Waller's reputation for——

A. Yes, I have.

Q. ——his reputation for honesty and being a law-abiding citizen? A. Yes.

Q. What did you observe to be his reputation in that respect? A. Well, it was very good.

Mr. Salvini: That's all.

(Testimony of K. S. Porter.)

Cross-Examination

By Mr. Erickson:

Q. He's a friend of yours, Mr. Porter?

A. Yes, he's a neighbor and friend.

Q. And did you hear the matter discussed that he had been convicted of grand larceny in 1935?

A. Well, I'd heard something to that effect just shortly after he came there.

Q. You heard that discussed in the vicinity of Sunnyside? A. Yes.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

ALFRED M. PULLEY,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Salvini:

Q. Will you please state your full name?

A. Alfred M. Pulley.

Q. And where do you reside?

A. Sunnyside.

Q. How long have you resided there?

A. Eight years.

Q. What is your business or occupation in the city of Sunnyside? A. Automobile dealer.

Q. Do you hold any public office in that city?

A. Yes, at the present time on the city council.

Q. And how long have you occupied that position? A. This is going on the sixth year.

(Testimony of Alfred M. Pulley.)

Q. Have you had the occasion to become acquainted with Melvin Waller, who is seated next to me? [271]

A. Yes, I have.

Q. How long have you known Melvin?

A. I've known about him since April, 1945.

Q. What was the basis of this acquaintance; how was it you became acquainted?

A. Became acquainted with him through the sale of a truck line to he and his brothers.

Q. Were you a prior owner of the Herrett Trucking Company?

A. I was a partner in the ownership of Herrett Trucking Company prior to the sale to the Wallers.

Q. Have you had the occasion to discuss with others in the Sunnyside community who also knew Waller, as to his reputation for honesty and being a law-abiding citizen?

A. Yes, I have, many occasions.

Q. What was the extent and nature of those discussions?

A. Well, in the first place, the trucking line operations were sold to Mr. Waller's brothers and himself on a contract basis, that is, it wasn't all settled for at the time, therefore we had a natural reason to check into the history of them, to establish the credit risk.

Mr. Erickson: I'm going to object to any specific credit information.

The Court: Yes, I think you shouldn't go into that. The general reputation is pertinent.

Q. Did you have occasion to discuss his reputa-

(Testimony of Alfred M. Pulley.)
tion in the city [272] of Sunnyside or in the Sunnyside community?

A. Yes. The most natural avenue that we had, the opportunity and the occasion normally arose to discuss his character and integrity, was by reason that the trucking line operations even after it was sold was still housed in our same building, and while they were in the back part of the building, we being in the front part of the building, customers doing business with them would come in the front part and start discussing their business with us before they found out that they were in the wrong office, and during such discussions we naturally had an opportunity to hear of what other people's feelings were toward them.

Q. What did you observe to be his reputation in the Sunnyside community as to being truthful and honest and a law-abiding citizen?

A. Well, in all cases without exception, why, it was good.

Mr. Salvini: That's all.

Cross-Examination

By Mr. Erickson:

Q. Did you hear the fact discussed that he had been convicted of grand larceny in 1935?

A. I didn't hear you.

Q. Did you hear the fact discussed that he had been convicted of the crime of grand larceny in 1935?

A. No, I haven't heard it discussed specifically.

Q. You haven't heard that discussed? [273]

(Testimony of Alfred M. Pulley.)

A. Yes, I heard about it; not discussed.

Q. When did you hear about it?

A. At the time that we checked into their past for the purpose of selling the truck line.

Q. Is he indebted to your company now, at the present time?

A. No, other than just an open account, regular monthly account, which is always——

Q. You do business with him, your firm?

A. Right.

Mr. Erickson: That's all.

(Whereupon, there being no further questions, the witness was excused.)

ED WALLER,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Robinson:

Q. State your name, please.

A. Ed Waller.

Q. Where do you reside, Mr. Waller?

A. In Sunnyside, Washington.

Q. Are you an officer of the Herrett Trucking Company? A. Yes.

Q. What office do you hold?

A. Second vice president.

Q. Are you familiar with the workings and transportation schedules of the Herrett Trucking Company during the [274] summer months of 1948?

A. Yes.

(Testimony of Ed Waller.)

Q. Was any regularly hourly schedule operated by any of the equipment or vehicles of the Herrett Trucking Company during that time? A. No.

Q. What hours are worked in your commercial trucking business there?

A. Any hour of the day or night. Whenever the truck is available and there's a load, it's unloaded or loaded.

Q. What portion of the handling of the commodities is customarily done at night in your business?

A. Well, quite a large proportion; maybe over half.

Q. What part of the hauling, as far as the trips are concerned, is made at night, Mr. Waller?

A. There must be 90 per cent of the driving done at night.

Q. Were potatoes loaded out of commercial warehouses during the hours of darkness during the potato digging season last year?

A. Quite frequently.

Q. At what warehouses did your firm load out potatoes after the hours of darkness?

A. At Phipps Warehouse in Sunnyside, and at Pacific Fruit in Wapato, and Balcom and Moe, I believe, in Grandview.

Q. Now, did you make a trip to Yakima on Wednesday, August 25? [275] A. Yes.

Q. 1948, that is. For what purpose did you come to Yakima?

(Testimony of Ed Waller.)

A. In the regular line of business, solicitation, mostly.

Q. Solicitation of what?

A. Solicitation of business for the company.

Q. Now, did Melvin Waller also ask you to do something for him when you were up here?

A. Yes.

Q. What did he ask you to do?

A. He asked me to buy some surplus potatoes.

Q. And did he give you some kind of money?

A. He gave me a personal check.

Q. Was the payee filled in, that is, the person to whom the check was payable, in that check?

A. It was made out to me.

Q. What did he tell you to do?

A. He told me to go to the courthouse and buy 150 tons of the surplus potatoes.

Q. What did you do, Ed?

A. I went up to the courthouse and found that I had to have a certified check.

Q. He didn't know that you had to have a certified check? A. No.

Q. Did you know where to go at the courthouse?

A. Well, I found out from the register in the courthouse. [276]

Q. And what did you do then?

A. I got the check cashed and got a post office money order made out to the Treasury Department, and took that back up.

Q. They told you you had to have either a post office money order or a cashier's check, is that right? A. That's right.

(Testimony of Ed Waller.)

Q. Then you went back up to the office of Mr. Quinn or someone in the Old Courthouse that was handling the sale of the potatoes, is that right?

A. That's right.

Q. I hand you plaintiff's exhibit 12, and ask you if you recognize the signature on that document as one you have seen before?

A. That's right, I signed that.

Q. You signed that for Melvin E. Waller?

A. That's right.

Q. At the time that you signed that, Mr. Waller, did anyone read it to you? A. No.

Q. Did anyone show you a form FV111, Plaintiff's Exhibit No. 13? A. No.

Q. Did anyone inform you that ownership of potatoes was claimed to be retained by the Commodity Credit Corporation after they had been delivered to the purchaser? A. No. [277]

Q. About how long were you in this office where you arranged this purchase?

A. A very few minutes.

Q. Was this paper that is plaintiff's exhibit 12 that you signed filled out when you signed it, other than the mimeographing that's on here?

A. There was parts of it filled out, but there was some parts still missing.

Q. Did you sign a lot of copies of it?

A. There was five or seven.

(Whereupon, certificate of purchase by Melvin Waller dated August 25, 1948, was marked Defendant's Exhibit No. 18 for identification.)

Q. I hand you defendant's identification 18, and ask you if you have seen that before?

(Testimony of Ed Waller.)

A. Yes, that's the only receipt I got.

Q. Is that the only thing that was given you?

A. That's right.

Q. This was given you at that time? A. Yes.

Mr. Robinson: I'll offer it.

Mr. Erickson: No objection.

The Court: It will be admitted.

(Whereupon, Defendant's Exhibit No. 18 for identification was admitted in evidence.) [278]

[Printer's Note: Defendant's Exhibit No. 18 is set out in full at page 329 of this printed Record.]

(Whereupon, Mr. Robinson read Defendant's Exhibit No. 18 to the jury.)

Q. About what time in the afternoon did you receive that form, to the best of your recollection, on August 25?

A. It must have been around 3 o'clock, a little after; maybe not that late.

Q. What did you do with it after you got it?

A. Well, I proceeded with the rest of the business that I had in Yakima, and went back to Sunny-side.

Q. What did you do with that form?

A. I laid it on the desk in our office.

Q. In your office down there?

A. That's right.

Q. Did you have some occasion at a later time to discuss the transaction in which you had been engaged with Melvin Waller?

A. It was quite some time later, several days be-

(Testimony of Ed Waller.)

fore I had a chance to talk to Mel regarding that.

Q. What discussion did you have at that time?

Mr. Erickson: To which we object as too remote from the time in question.

The Court: Overruled; go ahead.

Q. Generally, what discussion did you have in regard to this matter of these potatoes at a later time with Melvin Waller, Ed? [279]

A. I told Mel the procedure up here of having to get the check cashed, and the procedure that went on in the office in the courthouse, and how the thing worked out down there when a truck was to be loaded out, and so forth, and just the general procedure, and told him of having signed his name on the official looking documents, on whatever was necessary. I didn't read them at the time.

Q. I see. Now, Mr. Waller, to change the subject, with reference to the Herrett Trucking Company trucks, do they have signs on them indicating ownership?

A. Yes, there's identification on them.

Q. Is there some requirement of that by your state and federal common carrier permits?

A. The department of transportation requires that.

Q. Are those signs on your van bodies, your van trailers? A. No, just on the tractors.

Q. Where are the signs located on the tractors?

A. On the doors.

Q. Are they signs that are hard to read, small type, or are they large signs easily read?

A. They're large signs that you can read a

(Testimony of Ed Weller.)

block away; I think the requirement is 300 feet from the truck.

Q. You have to be able to read them 300 feet away? A. That's right.

Mr. Robinson: That's all. [280]

Cross-Examination

By Mr. Erickson:

Q. Mr. Waller, is it the function of your trucking company to transfer potatoes from graded sacks to plain sacks? Is that a normal function of your company?

Mr. Robinson: Object to that as improper cross-examination.

The Court: Well, I'll overrule the objection.

A. No, that isn't; whatever is in the line of our business; if we have to pick up spuds out of the field, we pick up out of the field; if we have to load grapes from vineyards, we load from vineyards on trucks, whatever is necessary.

Q. Do you ordinarily change commodities from one sack to another?

A. No, not necessarily, unless the shipper requires it for some reason.

Q. That is an unusual procedure, then, to dump potatoes out of branded sacks into plain sacks?

The Court: I think he's answered that, that they don't usually do it.

Q. You signed these forms without reading them, did you? A. That's right.

Mr. Erickson: That's all.

Mr. Robinson: That's all.

(Whereupon, there being no further questions, the witness was excused.) [281]

Mr. Robinson: The defense rests.

Mr. Erickson: We have one rebuttal witness.

KENNETH ROBINSON,

called as a witness for the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is Kenneth Robinson?

A. That's right.

Q. What is your employment with the Herrett Trucking Company at the present time, Mr. Robinson?

A. Secretary-Treasurer of the company.

Q. You keep the books?

A. I am directly responsible for the supervision of the books, yes.

Q. Pursuant to a subpoena, and at my request, did you bring a book of the Herrett Trucking Company to court this morning showing the disposition of gasoline to trailer TLE 1374 and TKE license 12310?

A. Yes, that's correct.

Q. You have the official book of the Herrett Trucking Company there with you now?

A. There's only one discrepancy, and that is that——

Q. No, is that the official book?

(Testimony of Kenneth Robinson.)

A. This is the official book of the Herrett Trucking Company, yes.

Q. And is that a corporation? [282]

A. The Herrett Trucking Company is a corporation.

Q. Are you a stockholder in it?

A. I'm a stockholder.

Q. And will you refer to that page that I marked? I'll refer you to—what do you call this book?

A. Trip record report.

Q. I'll refer you to the trip record report, of the page marked Federal No. 25, beginning July, 1948, and we'll mark that page for identification.

(Whereupon, a page of the book was marked Plaintiff's Exhibit No. 19 for identification.)

Q. Handing you plaintiff's identification 19, I'll ask you what that page purports to show, Mr. Robinson?

A. That shows the gasoline consumed by what we call our Federal truck number 25.

Q. And that's the van number which I read to you a moment ago is it not, license number TLE 1374 and TKE 12310?

A. Well, I can reasonably say that, but under oath I wouldn't know, for sure, because we don't keep track of our trucks by license numbers.

Q. Does that indicate a truck going to Portland, Oregon, on August 24 or 25, 1948?

A. Yes, it does.

Q. And does that record indicate that that truck was on company business at the time? [283]

(Testimony of Kenneth Robinson.)

A. No, it does not indicate that it was necessarily on company business.

Q. Is there any indication there that it was on private business?

A. There's no indication here that it was on private business.

Q. It's listed with the official trips that that truck made to other destinations throughout the state, is it not? A. That's right.

Q. And there's no distinction in that trip to Portland than any other trip the truck has made?

A. There's no other difference.

Q. Is there any indication in your record about payment for 100 gallons of gas?

A. There isn't anything in this book that shows that, no.

Q. You have no books or records to show the payment to the trucking company by Melvin Waller of \$25.00 for 100 gallons of gas for a trip on or about August 25, 1948, have you?

A. I haven't in this book, no.

Q. You haven't in any book, have you?

A. No, I haven't.

Mr. Erickson: That's all. First I want to offer this.

Mr. Robinson: No objection.

The Court: Admitted. [284]

(Whereupon, Plaintiff's Exhibit No. 19 for identification was admitted in evidence.)

[Printer's Note: Plaintiff's Exhibit No. 19 is set out in full at page 330 of this printed Record.]

(Testimony of Kenneth Robinson.)

Cross-Examination

By Mr. Robinson:

Q. What procedure was followed for the adjustment of the gasoline accounts?

A. I don't understand you.

Q. Well, how did you—when gasoline was purchased individually by officers or employees of the company, or arranged for, how was it handled?

A. We have in the company a petty cash fund, naturally, and what I call a cash box, and we keep a record at our gas pumps on our islands when the trucks gas up. When an individual in the corporation, or even an employee, wished to use gasoline from those pumps, they draw the gasoline from the pumps, put it on a slip that's on a tab out in front of the company, and they put a charge after it, or put their name down, and the bookkeeper checking the pumps the next morning draws up an I. O. U. slip when somebody shows for gasoline or anything of that nature, and it's put in the cash box, and at the end of the week, normally, we take all those I.O.U.'s out and take them from their check when they're being paid. That money is normally put back into the cash box. I don't remember this particular instance, but——

Mr. Erickson: I submit the question has been answered.

The Court: Yes.

Q. What procedure occurred with reference to the I.O.U.'s, or with reference to the slips that

(Testimony of Kenneth Robinson.)

you used to record the gasoline? Do you keep them, or what do you do with them?

A. Well, after the entry is made in the book we have no more use for the slips, and anybody that owes anything for the cash box just pays money for it, and it goes back into the cash box.

Q. How do you adjust the accounts of the officers?

A. Well, I naturally am responsible for the cash that's in that cash box, and I usually check it up once every two or three months, and when I do that I satisfy at least one or possibly all the members of the company that naturally I'm not absconding with the cash of the company, and if they're satisfied, entries are made and the slips are thrown away.

Q. Do you adjust the accounts with the officers periodically, every two or three months?

A. That's right.

Q. You've adjusted the accounts, then, for last August?

A. Oh, definitely, by this time, surely.

Q. And in the ordinary course of your procedure, then, you destroy these charge and credit slips that are personal to the officers and employees?

The Court: That's very leading, and I think he's [286] already testified to it.

Mr. Robinson: It's cross-examination, your Honor.

The Court: Well, he's really your witness in

(Testimony of Kenneth Robinson.)

effect, I think, and you shouldn't lead him too much.

Mr. Robinson: I'm trying to make this clear.

The Court: He's already testified to that, that he throws the slips away. Go ahead.

Q. Do you keep any permanent record of these adjustments between the officers and employees?

A. Not after it's paid back to the cash box.

Q. With reference to the Exhibit No. 19, does this show all trips taken by any particular piece of equipment, whether it is used in personal business for officers, or the company business?

A. Every trip that's made on the truck is in that book, regardless of whether it's personal or otherwise.

Q. Every trip that's made by the individual piece of equipment? A. That's right.

Q. So from the exhibit, Plaintiff's Exhibit 19, can you determine whether a trip made to Portland on the 24th or 25th is a personal trip or a company trip?

A. I can't tell whether it's a personal or a company trip.

Q. Do you make a different entry in that book whether it's a personal trip or a company trip?

A. No, I don't.

Mr. Robinson: That's all.

Redirect Examination

By Mr. Erickson:

Q. Well, now, do the officers of this company use this equipment for personal purposes, each officer

(Testimony of Kenneth Robinson.)

takes a piece of equipment when he wants it for his personal use? A. It's not uncommon, no.

Q. That's a frequent occurrence in that company?

A. I wouldn't say it was frequent, no, but it is done.

Q. And the officer that takes the equipment pays nothing to the company for the use of the equipment? A. He pays the expenses involved.

Q. Nothing for the wear and tear, the insurance, or anything else?

A. No, there's no depreciation, it's not broken down to fine points of depreciation, no.

Mr. Erickson: That's all.

Recross-Examination

By Mr. Robinson:

Q. How many people in this corporation; how many stockholders? A. Four.

Q. Their names?

A. Melvin Waller; Ed Waller, Homer, and myself, Kenneth Robinson.

Q. You own all the stock of the company?

A. That's correct. [288]

Q. And you're the officers of the company?

A. I'm an officer.

Q. You four are the officers of the company?

A. I have to qualify one statement; we have one other person that has a thousand dollars worth of stock in the company, by the name of William F. Herrett.

Q. What's the total capitalization?

(Testimony of Kenneth Robinson.)

A. The total allowed capital is \$75,000.00.

Q. He has one thousand dollars worth of stock?

A. Yes.

Redirect Examination

By Mr. Erickson:

Q. You talked to Mr. Robinson about this case this morning?

A. I came in with Mel Waller, yes.

Mr. Erickson: That's all.

Recross-Examination

By Mr. Robinson:

Q. You talked to the District Attorney before you took the stand?

A. I was subpoenaed by telephone, and I reported to the sheriff's office and talked to Mr. Erickson.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Erickson: The **Government rests.**

(Whereupon, there being no further testimony or evidence, counsel for the plaintiff and defendant presented their arguments to the jury.) [289]

COURT'S INSTRUCTIONS TO THE JURY

The Court: Now, ladies and gentlemen of the jury, it is my duty to instruct you as to the law governing this case. It is your duty, as jurors, to follow my instructions and to apply the law so

given to the facts as you find them from the evidence before you.

The jury must accept the instructions of the Court as comprising together a complete and correct statement of the law governing the case. Do not single out one instruction alone as stating the law, but consider the instructions as a whole.

You are here for the purpose of trying the issues of fact presented by the allegations of the indictment, and the denial by a plea of not guilty made by the accused. You are to perform this duty without bias or prejudice as to either party, and without sympathy for the accused. The accused and the public expect that you will carefully and dispassionately consider all the evidence, follow the law as stated by the Court, and reach a verdict just to each side, regardless of what the consequences may be.

An indictment is simply a legal accusation charging a defendant with the commission of a crime. It is not evidence against the accused, and does not create any presumption or permit of any inference of guilt. A defendant is presumed to be innocent of any crime. This presumption of innocence [290] continues throughout the trial, and is sufficient to acquit him unless the presumption is outweighed by evidence satisfying you beyond a reasonable doubt of the defendant's guilt.

A reasonable doubt is a fair doubt based upon reason and common sense, and arising from the evidence or lack of evidence in the case. It is rarely possible to prove anything to an absolute

certainty. A reasonable doubt exists whenever, after full and impartial consideration of all the evidence in the case, the jurors do not feel satisfied to a moral certainty that the defendant is guilty of the charge.

The requirement that a defendant's guilt be proved beyond a reasonable doubt is to be considered as included in each of these instructions which I shall give you.

The law on which the indictment in this case is based, members of the jury, and which it is alleged has been violated here, so far as it is pertinent in this case, reads as follows; I am reading from section 714m of Title 15 of the United States Code:

“Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned by * * * the Corporation”

and that means the Commodity Credit Corporation;

“shall upon conviction thereof be punished”

in the manner that the law provides. In order to find the [291] defendant Melvin E. Waller guilty of the charge against him in the indictment, you must find from the evidence beyond all reasonable doubt the existence of each of the following elements: One, that Melvin E. Waller either stole or removed or converted to his own use certain Irish

potatoes; two, that the potatoes were then owned by the Commodity Credit Corporation; three, that the defendant acted with the intent to deprive the owner of the potatoes of the property. If you find from the evidence that the government has failed to establish either or both of these elements, or any of them, beyond a reasonable doubt, then you will acquit the defendant, but if you find that the government has established the existence of all three elements beyond a reasonable doubt, then it is your duty to convict the defendant of the charge in the indictment.

In order that you may find that the defendant stole, removed, or converted potatoes to his own use, you must find his action was willful and intentional as distinguished from inadvertence and mistake. Ordinarily a person is presumed to intend what he does. You are instructed that the law presumes every man intends the natural consequences of his own actions, and intent may be presumed if it is shown such actions were part of his plan or scheme to violate the law as charged. The evidence of intent may be shown by the actions of the parties concerned and the actual circumstances, as well as by direct [292] evidence. It is impossible to enter into the mind of the defendant and determine the intent with which he acted, or the purpose he had, or the knowledge he possessed; therefore it is proper for you to determine, under the evidence, the knowledge and intent he had and the purpose, from the evidence and all the facts and circumstances shown by the evidence.

You are instructed that potatoes acquired by the United States Department of Agriculture, Production and Marketing Administration, are owned by the Commodity Credit Corporation, and title to the potatoes does not pass to the purchaser until the potatoes delivered are actually fed to livestock or processed into feed for livestock, and in this case, the potatoes purchased by Charles F. Williamson pursuant to his contract remained the property of and were owned by the Commodity Credit Corporation until actually fed to livestock or processed into livestock food. The Commodity Credit Corporation is a corporation chartered by the United States to purchase and dispose of surplus agricultural commodities.

If you find from the evidence in this case that the defendant did steal or convert to his own use potatoes which were not his, but not known to the defendant to be owned by the Commodity Credit Corporation, and the potatoes were owned by the Commodity Credit Corporation, the defendant would nevertheless be guilty of stealing or converting to his own use the property of the Commodity Credit Corporation. In other words, [293] if the defendant intended to steal or convert certain property which he knew was not his, and did steal or convert it, and it later should develop that the property was the property of the Commodity Credit Corporation, then the defendant would nevertheless be guilty of the crime charged, although he did not know at the time that the property was the property of the Commodity Credit Corporation.

You are further instructed that it is not necessary that the defendant himself did do all of the acts charged against him in the indictment, but if the defendant either himself did the acts charged, or procured others to do part of the acts charged therein, you should nevertheless convict the defendant if you find otherwise that he is guilty under the instructions I have given you. If you find that the defendant knowingly procured others to do parts of the acts charged, he would be guilty as the principal.

To steal, as used in the statute and in this indictment, means to take and carry away the personal property of another with intent to appropriate it to the use of the taker, and with intent to deprive the owner thereof.

You as jurors are the sole judges of the credibility of the witnesses and the weight to which their testimony is entitled. A witness is presumed to speak the truth. However, this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or [294] by contradictory evidence. You should carefully scrutinize the testimony given and all the circumstances under which each witness has testified. Consider each witness's intelligence, demeanor, and manner while on the stand, and the relationship he may bear to each side of the case. Consider also the manner in which he may be affected by the verdict, the extent to which he is supported or contradicted by other evidence, and every

other matter which tends to indicate whether he is worthy of belief.

If a witness is shown to have willfully testified falsely concerning any material matter, you have a right to distrust his other testimony, and you may reject all the testimony of that witness which is not supported by other credible evidence.

A defendant who wishes to testify is a competent witness, and a defendant's testimony is to be judged in the same way as that of any other witness.

There has been admitted in evidence for your consideration evidence of the conviction of the defendant of a certain offense in the past. It's sole purpose was to impeach or discredit the defendant as a witness. You are to consider it only insofar as it may affect the credibility of the defendant as a witness and the weight and value to be attached to his testimony. It is not to be considered as evidence of the commission of the offense charged in the indictment in the present case. [295]

Evidence also has been admitted of the good reputation of the defendant for honesty and fair dealing in the community in which he resides. It is to be considered by you, together with all the other evidence in the case, in determining the guilt or innocence of the accused. Of course, if you are convinced beyond a reasonable doubt of the guilt of the accused, evidence of good reputation alone would not entitle him to acquittal.

In your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are authorized to draw from the

facts proved such inferences as seem justified in the light of your experience.

You should distinguish carefully between what has been testified to by the witnesses and what has been said by the attorneys. The arguments are designed to assist you in passing upon and finding the facts, but the statements and arguments of counsel are not evidence, and are not to be regarded as such. You are likewise instructed to disregard entirely any and all comments made by the Court in ruling on questions of evidence or in talking to counsel or admonishing them throughout the trial. That, as I told you before, is merely the functioning of the Court in seeing that the trial proceeds in an orderly way according to the rules which are applied here, and all those comments I have made are to be disregarded by you entirely. You are to consider only the [296] evidence before you, that consists of the sworn testimony of the witnesses and the exhibits received in evidence.

There is nothing peculiar or mysterious in the way a jury is to consider the proof in a criminal case. You are expected to use your good sense, consider the evidence only for those purposes for which it has been admitted, and give it a reasonable and fair construction.

I have no said anything to you about the punishment which the law provides in the event of conviction. The punishment is a matter exclusively within the province of the court. It is not to influence your deliberations in any way.

The verdict must represent the considered judgment of every juror. In order to reach a verdict, it

is necessary that each juror agree thereto; your verdict must be unanimous.

It is your duty to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after a consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to change an opinion when convinced it is erroneous, but do not surrender your honest convictions as to the effect or weight of evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Upon retiring to the jury room you will select one of your [297] number to act as foreman. Your foreman will preside over your deliberations, and be your spokesman in court. You will take with you to the jury room the indictment, the exhibits, and a form of verdict which has been prepared for your convenience. Omitting the formal heading, it reads: "We, the jury in the above-entitled cause, find the defendant" and a blank space, "guilty as charged in the indictment." If you find him not guilty, simply write in the word "not". The verdict is prepared in that way merely for convenience, and is not intended to indicate, of course, what your verdict should be.

The jury will just step out for a moment while we have other short proceedings in your absence.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: You may take your exceptions now.
Mr. Robinson: First, I noticed I omitted to make

a motion for judgment acquittal. I don't know any reason why that can't be made now. I thought I'd make it.

The Court: Yes, the record may show that the defendant's motion for acquittal has been renewed. I assumed you would renew it.

Mr. Robinson: I had a note on it.

The Court: Well, the record may show that you renewed it at the close of all the evidence, and that the Court at this stage is reserving decision on the motion in accordance with [298] the provisions of Rule 29b of the Rules of Criminal Procedure.

Mr. Robinson: Yes. The defendant at this time excepts to the giving—you don't have those numbered, do you?

The Court: No, I don't have them numbered. I didn't give out copies of these, because I didn't have them prepared. Is it one that was proposed by the government?

Mr. Robinson: Yes, the one that states "property"—

The Court: I think those are numbered by pencil.

Mr. Robinson: Yes, number 2 is the one in pencil.

The Court: I want to assist you in making your exceptions. Then you can refer to them as pencil numbered instructions.

Mr. Robinson: The giving of pencil numbered instruction 2 of the plaintiff's requested instructions on the following points and on the following grounds: First, that said instruction is erroneous in instructing the jury that the potatoes acquired by the United States Department of Agriculture, Production and Marketing Administration, are property of the Com-

modity Credit Corporation, because there is no evidence to that effect, and no factual basis upon which that conclusion could be drawn.

The Court: Pardon me for interrupting, but I interlined there "owned by" and you want to except to that too, I presume; I think it was in that one.

Mr. Robinson: Oh, yes, it is, and owned by, the words I quoted, Production and Marketing Administration, and are owned [299] by the Commodity Credit Corporation; second, an exception to the instruction that the title to the potatoes does not pass to the purchaser until the potatoes delivered are actually fed to livestock or processed into feed for livestock; third, an exception to the instruction that in this case the potatoes purchased by Charles F. Williamson pursuant to his contract to purchase potatoes for livestock food remained property of and were owned by the Commodity Credit Corporation until actually fed to livestock or processed into livestock food. Exception to those is based upon the ground that the instructions are without legal foundation or basis, and remove a vital and fundamental factual issue from the jury's consideration, to the prejudice of the defendant. Further exception is made to the sentence "the Commodity Credit Corporation is a corporation chartered by the United States to purchase and dispose of surplus agricultural commodities, for the reason that the statement is incomplete and therefore not a correct statement with reference to said corporation. That's the only exception, your Honor.

The Court: Do you have any suggestions to make, Mr. Erickson?

Mr. Erickson: No, I haven't.

(Whereupon, the following proceedings were had within the presence of the jury.)

(Whereupon, Irene Keenan and C. W. Carlile were sworn as [300] bailiffs.)

The Court: I think you should take the jury to lunch before they start deliberating. You will retire to consider your verdict, ladies and gentlemen.

(Whereupon, at 12:15 o'clock p.m., the jury retired to deliberate upon its verdict.)

(At 2:10 o'clock p.m., the defendant and his counsel Mr. Robinson being present, the United States Attorney, Mr. Erickson, being present, the following proceedings were had without the presence of the jury.)

The Court: I have grave doubts about this plaintiff's requested instruction number 2. I'm afraid I didn't get the full purport of it when I read it and gave it, and I recall that there was no discussion of it when I discussed the instructions with counsel, defendant's counsel didn't comment on this particular instruction or object to it, although he did object to another instruction that the Court then decided not to give, and if I got the purport of the exception as it was made by counsel as he stood very close to the table here, it was not what I expected it to be. I think your exception was worded, Mr. Robinson, that it was withdrawing factual issue from the jury. Was that the exception that you took to the instruction?

Mr. Robinson: I tried to take the exception that your Honor was instructing the jury that the Com-

modity Credit [301] Corporation was the owner of the property.

The Court: And that that took a factual issue from the jury?

Mr. Robinson: Well, and was not the correct statement of it. I don't think I intended to raise any new issue from the one that was in the motion for judgment of acquittal.

The Court: Well, the vice of this instruction, I'm afraid, is that it isn't just putting forward the theory that if title is reserved, that that indicates that the Commodity Credit Corporation has ownership. It's a direct factual instruction to the jury that the Commodity Credit Corporation was the owner of these potatoes, and your exception covered that, and your argument didn't cover it, of course, but you didn't object to this instruction at all, you didn't call that to the court's attention when I was discussing the instructions with you.

Mr. Robinson: I'm sorry; I knew your Honor had decided that issue——

The Court: Not that issue; your exception is I'm taking a factual question from the jury. I didn't get your exception very clearly. I think it's the function of the jury to examine these documents and determine whether the title was withheld. I'm afraid I'm not justified in instructing the jury that one of the essential elements of this offense is that the Commodity Credit Corporation owned these potatoes, and [302] then turn around and instruct them that the Corporation did own the potatoes.

Mr. Robinson: I'm not sure I agree with your Honor on that, although it seems to be an argument

for the government, because we presented on motion as a matter of law that the Commodity Credit Corporation did not own them, and your Honor decided that they did.

The Court: That's the thing I think if you were frank with the Court you should have called to my attention. You didn't object to that at all. I propose to call the jury back and recall that instruction and give them another one in lieu of it. I'm going to instruct them a little more fully what the Commodity Credit Corporation is, and instruct them if they find these potatoes were acquired by the Commodity Credit Corporation pursuant to its program of stabilizing farm income and prices, and such potatoes were sold and delivered over to Charles F. Williamson by and through the Commodity Credit Corporation, an agent of the United States, to be fed to livestock, and if the jury further finds that by the terms of the contract title was reserved and did not pass to the purchaser until the potatoes were actually fed to livestock or processed into feed for livestock, then they will be justified in concluding that the potatoes were actually owned by the Commodity Credit Corporation until fed or processed. I don't want error to get into the record that pertains to the merits [303] of the case. I'm perfectly willing for you to reserve your point. I don't like counsel to, I won't say put traps into the record, but leave them there once they get there.

Mr. Robinson: How should the exception have been taken? I intended to raise the point by the exception I took.

The Court: Read that exception.

(Whereupon, the reporter read as follows: "Exception to those is based upon the ground that the instructions are without legal foundation or basis, and remove vital and fundamental factual issue from the jury's consideration, to the prejudice of the defendant.")

The Court: What I'm talking about there, I said I propose to give these instructions, you didn't raise any objection to this on the ground it took the fact issue away from the jury.

Mr. Robinson: I thought the taking away the fact issue from the jury was the way to except from an instruction your Honor had previously decided on. I don't mean to put a trap into the record.

The Court: Well, you could see two different things there, certainly. Bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Now, members of the jury, I don't want you to tell me how you stand, or what you've done at all, except I [304] want you to say whether or not you have reached a verdict.

Foreman: We haven't agreed, your Honor.

The Court: I called you back in here because during the recess, in looking over one of the instructions I gave to you, I've come to the conclusion it's not accurate, it's erroneous. I want you to disregard it. That instruction reads: "You are instructed that potatoes acquired by the United States Department of Agriculture, Production and Marketing Administration, are owned by the Commodity Credit Corporation, and title to the potatoes does not pass to

the purchaser until the potatoes delivered are actually fed to livestock or processed into feed for livestock, and in this case, the potatoes purchased by Charles F. Williamson pursuant to his contract remained the property of and were owned by the Commodity Credit Corporation until actually fed to livestock or processed into livestock food. The Commodity Credit Corporation is a corporation chartered by the United States to purchase and dispose of surplus agricultural commodities.”

Now, you are to utterly disregard that instruction, and in place of it, I'll instruct you as follows: First, in order to more fully explain what this Commodity Credit Corporation is, I'll read to you from the Act of Congress establishing it, which is Section 714 of Title 15 of the United States Code: “For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of [305] balanced and adequate supplies of agricultural commodities, products there, foods, feeds and fibers, and of facilitating the orderly distribution of agricultural commodities, there is created a body corporate to be known as Commodity Credit Corporation, which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general direction and control of its Board of Directors.”

You are further instructed that if you find from the evidence in this case that the potatoes mentioned in the indictment were acquired by the United States Department of Agriculture pursuant to its program of stabilizing farm income and prices, and that such potatoes were sold and turned over to Charles F.

Williamson by and through the Commodity Credit Corporation, an agency of the United States, through the Department of Agriculture, to be fed to livestock, and if you further find that by the terms of the contract, title was reserved and did not pass to the purchaser until the potatoes were actually fed to livestock or processed into feed, then you will be justified in concluding that the potatoes were owned by the Commodity Credit Corporation until fed to livestock or processed into livestock feed.

Now, as I told you in connection with the other instructions you're not to place any special emphasis on this instruction, but consider it in connection with all the other instructions. [306] You will now retire. You're not to start deliberating again. Just don't deliberate until I bring you in again.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: All right, you may take your exceptions now.

Mr. Robinson: I'm not trying to conceal from the Court the exceptions. I'll stand on this side of the table. We're used, in state court, to stand close to the reporter.

The Court: I didn't mean to infer there was anything surreptitious about taking your exceptions; that's the customary method of doing it. I only mentioned that because I didn't get the full purport of your exception at the time. I got thinking about it during the lunch hour. The only criticism was, I thought if you had that in mind you might have mentioned it before when we discussed it.

Mr. Robinson: I know in the Federal Court your Honor fixes the instructions, and I did not realize you invited full comments.

The Court: That's right.

Mr. Robinson: The defendant excepts to the giving of the instruction just read to the jury for the reason and upon the following grounds: That the reading of a portion of the act of Congress in question is not clear, and confusing to the jury with reference to the matters contained therein, and with particular reference to the nature of the property of the [307] Commodity Credit Corporation, and upon the ground that the statement—your Honor doesn't have that typed out, does he?

The Court: No; I have it in longhand here.

Mr. Robinson: Well, that's so much easier than mine to read.

The Court: You may have some trouble with it.

Mr. Robinson: ——and further excepts to the language in the instruction—I can include the whole instruction that is referred to, without reading it.

The Court: I suppose you call it the instruction given in lieu of the one as given by the plaintiff.

Mr. Robinson: If the reporter will read it into the record here, the whole instruction given in lieu of proposed instruction number 2 by the government, upon the ground that the principles of law stated therein are incorrect and erroneous, in that the jury would not as a matter of law be justified in concluding that the potatoes were owned by the Commodity Credit Corporation by reason of the facts preliminarily to be found as instructed by the Court in this

instruction, and that said instruction is erroneous as a matter of law.

The Court: All right. You may bring in the jury again.

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: I'm sorry to keep you running back and forth [308] so much, members of the jury, but that's the way we have to do things. You will now retire to consider your verdict. When you reach a verdict notify the bailiff and he'll see that you're brought into court again so we can receive your verdict. You will now retire to consider your verdict.

(Whereupon, at 2:27 o'clock p.m., the jury retired to deliberate upon its verdict.) [309]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on February 14, 15, and 16, 1949, at Yakima, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had therein,

excepting opening statements to the jury, argument on motion for judgment of acquittal, and final arguments to the jury.

Dated this 11th day of April, 1949.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed April 14, 1949. [310]

PLAINTIFF'S EXHIBIT No. 1

To: C. F. Williamson:

Your eligibility fee has been paid in full, complete the enclosed application by showing your share in crop and answering question 9 (b) and (c) and return it to the office as soon as possible.

/s/ G. D. COPELAND,
Chairman, Yakima County A. C. A.

Form 48 Potatoes—5 (Revised)

PRODUCER'S APPLICATION FOR CERTIFICATE OF ELIGIBILITY

“The planting of potatoes in excess of the 1948 goal established for any farm, or, where separate goals are established for early and late potatoes, the planting of potatoes in excess of either such goals, shall, subsequent to the date of such excess planting, render any person having an interest in such farm as operator, owner, landlord, tenant, or partner ineligible to participate in 1948 potato price support operations. Such ineligibility shall extend also to any corporation or corporate stockholder whose op-

Plaintiff's Exhibit No. 1—(Continued)

erations are subject to substantially the same management, ownership, or control as those of a corporation or corporate stockholder planting potatoes in excess of an acreage goal. The entire interest in potatoes planted within a non-commercial farm goal must be in the owner, or in the owner and the operator of such farm as a unit. Any person having an interest other than as owner or operator in potato production from one or more non-commercial farms shall be ineligible to participate in 1948 potato price support operations." (12 F.R. 8875, December 31, 1947.)

* * * *

I, C. F. Williamson, hereby apply for a certificate of eligibility to participate in the 1948 Irish potato price support program of the United States Department of Agriculture. In making this application I hereby represent and agree as follows:

1. (a) That I will not sell ungraded potatoes or field-run potatoes except to the Department of Agriculture or to eligible dealers (dealers who have entered into a Dealer Agreement with the Department) in the 1948 potato price support program.

(b) That I will not sell 1948 crop potatoes of or below U.S. No. 1 Size B grade or quality, or U.S. No. 2 grade or quality regardless of size except to the Department, to eligible dealers or with prior approval by the Department to processors, livestock feeders, or for export.

(c) That I will not sell cull potatoes except to eligible dealers or with prior approval of the Department, to processors, livestock feeders, or for export.

Plaintiff's Exhibit No. 1—(Continued)

The restrictions contained in sub-paragraphs (a), (b), and (c) above do not apply to sales of seed potatoes officially certified and tagged by an official State seed certifying agency.

2. That I will not offer for delivery under the Department's price support program any potatoes which:

(a) Fail to meet at least the quality requirements of U.S. No. 2 grade, $1\frac{7}{8}$ inches minimum diameter, or of U.S. No. 1 Size B grade, or

(b) Are damaged or affected by disease, insects, frost, or other injury to an extent rendering them unfit for normal consumption or unable to withstand normal shipment or storage, regardless of whether or not they meet requirements of U.S. grades; or

(c) Were harvested from land infested at harvest time with golden nematode or from land officially designated by a State or Federal agency as unfit for potato production because of disease or insect infestation; or

(d) Are limited or restricted in their distribution by quarantine regulations of a State or Federal agency.

3. That potatoes offered by me for price support which may be found objectionable because of odor, flavor, internal discoloration or other invisible damage, whether or not apparent at time of shipment and whether or not subject to determination by customary shipping point inspection procedure, shall not be eligible for price support and that upon claim by

Plaintiff's Exhibit No. 1—(Continued)

the Department I shall reimburse the Department the sums received for such potatoes plus transportation and handling costs which the Department may have expended upon such potatoes.

4. That I will permit inspection by Department representatives at any reasonable time of my farm (or farms), potatoes, and storage wherever located, in connection with the price support program.

5. That I will offer for delivery under the Department's price support program and will sell to eligible dealers only potatoes in which I have an interest at harvest time as an owner-operator, tenant, or landlord.

6. That the Department may prescribe time periods within which I shall offer for price support only such quantities of potatoes as the Department determines to be a reasonable portion of the maximum quantity eligible for price support.

7. That the Department, when price support purchases are being made, may request delivery of any portion of my potatoes during specified period and in a specified manner, and if I fail to make such delivery the Department shall be relieved of any further price support obligation with respect to any of my potatoes.

8. (a) That I will make every effort to sell through regular commercial channels at not less than support prices announced by the Department all my potatoes grading better than U. S. No. 1, Size B or U. S. No. 2.

(b) That I will sell potatoes grading U. S. No. 1

Plaintiff's Exhibit No. 1—(Continued)
or better to the Department under the price support program only when I am unable to obtain the equivalent of support price in commercial markets.

9. That the following statement as to farms and as to my interests in the potato crops listed below represents my entire interest in potatoes of the 1948 crop, and that the planted acreage on each farm is within the potato goal for such farm.

(a) In Yakima County: Farm Serial No. 7726; Interest in Crop, 100%; Acreage Goal, 132.00; Eligibility Fee, \$264.

(b) In other counties in this State (names of counties only): None.

(c) In other counties of other States (name of State and county): None.

10. That I hereby tender a fee amounting to \$264, to defray partially the expense of establishing my eligibility and the eligibility of my potatoes, such fee being the larger of \$3.00 or the rate established for this county, times acreage goal, times my interest in the potato crop. I understand that no refund of such fee will be made in whole or in part.

I understand and agree that any misrepresentation herein or any violation by me of this agreement will render me ineligible to participate in the price support program, and that I shall be liable for the payment to the Department of any damage suffered by it as a result of such misrepresentation or violation.

Date: May 15.

/s/ C. F. WILLIAMSON,
Producer.

Plaintiff's Exhibit No. 1—(Continued)

CERTIFICATE OF ELIGIBILITY

This is to certify that the above named producer has agreed to the established conditions for participating in the 1948 Potato Price Support Program, has paid the initial service fee, has planted potato acreage within the goal(s) established for his farm(s), and is eligible to participate in the program.

Date: 7/23/48.

**YAKIMA COUNTY AGRICULTURAL
CONSERVATION COMMITTEE,**

By /s/ D. A. GILLETTE.

PLAINTIFF'S EXHIBIT No. 2

Form 48—Potatoes—3

United States Department of Agriculture
Production and Marketing Administration

Program PC-3b-91

Contract No. Apm(Fx)44

1948 POTATO DEALER AGREEMENT

This Agreement, made and entered into this 20th day of June, 1948, by and between H. H. Simmons & Sons, of Box 381, Sunnyside, Washington (hereinafter referred to as "Dealer") and the Commodity Credit Corporation, an agency of the United States (hereinafter referred to as "CCC").

Witnesseth That:

Whereas, on November 28, 1942, the Secretary of Agriculture (hereinafter referred to as the "Secretary") made a public announcement requesting in-

Plaintiff's Exhibit No. 2—(Continued)

creased production of potatoes, among other commodities; is therefore required, under the Steagall Amendment (Act of July 1, 1941, as amended), to institute operations which will support prices to producers of Irish potatoes at not less than 90 percent of parity through December 31, 1948; and in accordance with said amendment has instituted a program designed to carry out the mandate of Congress; and

Whereas, in carrying out this program, the Secretary desires to utilize the facilities of established and qualified commercial potato dealers; and

Whereas, Dealer is licensed under the Perishable Agricultural Commodities Act (7 U.S.C. 1940 ed. 499a-499r) by the United States Department of Agriculture, has met the requirements of the State PMA Committee with respect to qualifications and facilities, and is ready, willing, and able to assist the Secretary in carrying out the mandate of Congress under the Steagall Amendment;

Now, Therefore, in consideration of the promises herein contained, the parties hereto mutually agree as follows:

Article 1. Definitions. "Eligible Vendors" as used herein shall mean (1) growers who have been determined by County Agricultural Conservation Committee(s) to be eligible for participation in the 1948 Irish Potato Price Support Program; (2) dealers who have entered into a Dealer Agreement with CCC; and (3) others specically approved by CCC.

"Eligible Potatoes" as used herein shall mean all potatoes produced by eligible growers, except (a)

Plaintiff's Exhibit No. 2—(Continued)

potatoes failing to meet at least the quality requirements of U.S. No. 2 grade $1\frac{7}{8}$ inches minimum diameter or the requirements of U.S. No. 1 grade, size B; (b) potatoes damaged or affected by disease, insects, frost, or other injury to an extent rendering them unfit for normal consumption or unable to withstand normal shipment or storage, without regard to whether or not they meet grade requirements of U.S. Grades; (c) potatoes harvested from land infested at harvest time with golden nematode or from land officially designated by a State or Federal agency as unfit for potato production because of disease or insect infestation; (d) potatoes whose distribution is restricted or limited by State or Federal quarantine regulations; and (e) potatoes found objectionable because of odor, flavor, internal discoloration, or other invisible damage whether or not apparent at times of shipment and whether or not subject to determination by customary shipping point inspection procedure, provided however, that discovery of such condition after purchase, acceptance or delivery, and appropriate adjustment therefor, shall be construed as satisfactory administration of this exception and satisfactory performance of contractual requirements by the vendor.

“U. S. Grades” as used herein shall mean those defined in U. S. Standards for potatoes, effective June 1, 1942, and any subsequent amendments thereto or reissues thereof, and U. S. qualities are the comparable U. S. grades but without tolerance for defects or undersize.

“When directed by CCC”, “authorized by CCC,”

Plaintiff's Exhibit No. 2—(Continued)

“prescribed by CCC,” and similar phrases as used herein shall mean directions, authorizations, or instructions, as the case may be, and modifications thereof, given in writing to Dealer by the Chairman or Acting Chairman of the State PMA Committee or by a CCC Contracting Officer authorized by such Chairman or Acting Chairman, and with respect to operations under Article 5, shall in addition include the provisions contained in that Article.

“Applicable support prices” as used herein shall mean support prices heretofore or hereafter announced by the United States Department of Agriculture with reference to the 1948 crop of Irish potatoes, adjusted for marketing services not performed in accordance with the schedule of marketing services attached hereto.

A “Contracting Dealer” as used herein shall mean a Dealer who has entered into a “1948 Potato Dealer Agreement,” Form 48—Potatoes—3, with CCC, or into a similar agreement with CCC.

Article 2. Purchase and Sale of Potatoes by Dealer.

(I) Dealer shall purchase and sell in all of Dealer's operations only potatoes of eligible vendors. Dealer shall pay for all eligible potatoes not less than the equivalent of applicable support prices. If Dealer is a cooperative association of growers, the return to each grower shall be at not less than equivalent of applicable support prices for eligible potatoes.

(II) Dealer shall make every effort to sell in commercial operations all potatoes other than those specified in paragraph (III) of this Article. If, upon

Plaintiff's Exhibit No. 2—(Continued)

request of Dealer, CCC determines, and this determination shall be final, that commercial outlets are such that after using every reasonable effort Dealer is unable to dispose of eligible potatoes in Dealer's own operations at prices at least equivalent to current support prices, CCC will issue appropriate directions or authorizations for disposition of potatoes as provided in Article 3.

(III) Dealer shall sell (except for seed potatoes officially certified and tagged by an official State seed certifying agency) (a) ungraded or field-run potatoes only to CCC or to other contracting dealers (b) potatoes of U.S. No. 1 grade or quality, size B, or U.S. No. 2 grade or quality, regardless of size, only to CCC or other contracting dealers, or as otherwise directed or authorized by CCC, and (c) cull potatoes (those below U.S. No. 1 grade or quality, size B, or U.S. No. 2 grade or quality, $1\frac{7}{8}$ inches minimum diameter) only to other contracting dealers or, when authorized by CCC, to processors, livestock feeders, or for export. Authorizations or directions referred to in this paragraph will be issued as provided in Article 3.

Article 3. Directions or Authorizations for Disposition of Potatoes.

When CCC determines that Dealer is unable to dispose of eligible potatoes at prices at least equivalent to support prices as provided in Article 2 (II) hereof, or when Dealer requests authority to dispose of potatoes as provided in Article 2 (III) hereof, CCC shall; (I) Authorize Dealer to sell potatoes of

Plaintiff's Exhibit No. 2—(Continued)

U.S. No. 1, size B, or U. S. No. 2, $1\frac{7}{8}$ inches minimum diameter, grades in commercial food outlets at prices as authorized by CCC and without any liability by CCC; or (II) authorize Dealer to sell potatoes of U.S. No. 1 grade or quality, Size B, or U.S. No. 2 grade or quality, regardless of size, or potatoes of a lower grade or quality, to processors, livestock feeders, or for export and without any liability by CCC; or (III) direct or authorize Dealer to sell eligible potatoes in designated outlets, such as livestock feeders, processors, and similar diversion outlets at or above minimum prices or at fixed prices, as prescribed by CCC; or (IV) direct or authorize Dealer to deliver eligible potatoes to CCC, or to others for the account of CCC, in the manner prescribed by CCC; or (V) direct or authorize Dealer otherwise to dispose of eligible potatoes in a manner prescribed by CCC; or (VI) direct or authorize Dealer to sell eligible potatoes below support prices pursuant to Article 5 hereof. CCC may combine any or all of such directions or authorizations.

Article 4. Payment to Dealer for Potatoes Disposed of.

If Dealer is in compliance with all the provisions of this agreement and directions or authorizations issued pursuant thereto, CCC will pay to Dealer for potatoes sold, delivered or otherwise disposed of in accordance with clauses (III), (IV) and (V) of Article 3, the announced support prices, adjusted for marketing services not performed at the rates specified in the schedule of marketing services which is

Plaintiff's Exhibit No. 2—(Continued)

attached hereto and made a part hereof. This payment shall be made on the basis of the support price applicable at the time of the sale, delivery or other disposal, as the case may be, on the basis of the quantity found to exist at that time, and on the basis of the grade determined by Federal-State inspectors at or within 48 hours prior to such time. Though Dealer may deliver to CCC or for the account of CCC potatoes which he acquired at higher than applicable support prices, the liability of CCC shall not be increased thereby. When Dealer sells potatoes at or above minimum prices or at fixed prices, as prescribed by CCC, in accordance with clause (III) of Article 3, he may retain 10 per cent of the net sales price (gross sales price less transportation charges, if any, included in such gross sales price), and the balance of the net sales price shall be deducted from any amounts owing to Dealer by CCC under this Article or Dealer shall pay the balance of the net sales price to CCC.

Article 5. Sales Below Support Prices.

When directed or authorized by CCC as provided in Article 3 (VI), Dealer will offer for sale in commercial outlets, at minimum prices prescribed by CCC which will reflect less than the applicable support prices, any potatoes of designated quantities, qualities, grades, sizes, and varieties, acquired by Dealer at applicable support prices. When directed or authorized to offer for sale under this Article, Dealer may offer for sale stock acquired at higher than applicable support prices, but in such case the

Plaintiff's Exhibit No. 2—(Continued)

liability of CCC relative to any such potatoes shall not be increased thereby. In the event such direction or authorization is issued to Dealer by the Chairman or Acting Chairman of the State Committee or a CCC Contracting Officer, there shall be attached thereto a signed or a "certified true and correct" copy of the corresponding direction or authorization given to such Chairman, Acting Chairman of the State Committee or a CCC Contracting Officer, by the Director or Acting Director, Fruit and Vegetable Branch, Production and Marketing Administration.

Article 6. Payment by CCC on Sales Below Support Prices.

When Dealer sells below the applicable support price in accordance with Article 5 and is in compliance with all other provisions of this agreement, CCC will pay him the difference between support price at time of sale adjusted for marketing services not performed and the sales price. If he sells at a lower price than the minimum prescribed by CCC, he shall not be entitled to any greater payment than if he had sold at the prescribed minimum price.

Article 7. When CCC will not Assume Liability.

In no event will CCC assume any liability for potatoes at or after the time they have been placed in transit by Dealer without prior authorization by CCC. In no event will CCC be liable for payment of any marketing services other than those authorized for the disposal outlet actually utilized. CCC will not assume any credit risks involved in sales by

Plaintiff's Exhibit No. 2—(Continued)

Dealer other than in connection with the delivery by Dealer for the account of CCC in accordance with clause (IV) of Article 3; however, Dealer shall not be required to extend credit to any person other than CCC in complying with any direction or authorization of CCC. CCC reserves the right to limit the quantities of potatoes to be disposed of in designated outlets during specified periods of time and, in the event that potatoes are not disposed of by Dealer in accordance with direction or authorization of CCC pursuant to this agreement, to limit or cancel the obligations of CCC to Dealer under this agreement.

Article 8. Terms of Sale for Designated Outlets.

When directed or authorized by CCC to sell potatoes in outlets other than domestic food and seed markets, Dealer shall require each purchaser to agree that the potatoes purchased will be used only by the purchaser and only for the purpose for which they were sold and will not be used in any form for human consumption. In view of the difficulty of ascertaining the exact damages suffered by CCC as a result of the potatoes being used for purposes other than those for which they have been sold, the agreement between Dealer and the purchaser shall provide that in case potatoes are used for a purpose other than the purpose for which they have been sold, the purchaser shall pay to CCC, as compensation and not as penalty, the amount of \$4.00 for each hundredweight or fraction thereof of potatoes used for food or seed or for export and \$1.00 for each hundredweight or fraction thereof of potatoes used

Plaintiff's Exhibit No. 2—(Continued)

for purposes other than for food, seed, or for export and other than authorized by the purchaser's agreement.

Article 9. Identifying Potatoes.

When directed by CCC, Dealer shall identify potatoes sold, delivered, or disposed of in other than domestic food and seed markets, and take such action as prescribed by CCC, for instance by marking or dyeing potatoes, as will confine such potatoes to the uses for which they were disposed.

Article 10. Liquidated Damages.

In the event Dealer purchases or sells potatoes of an ineligible vendor; or pays for eligible potatoes less than the equivalent of applicable support prices; or fails to comply with any of the provisions of Article 2 (III); the parties hereto agree, in view of the difficulty of ascertaining the exact damages suffered by CCC as a result of such actions, that such damages shall be \$4.00 per hundredweight or fraction thereof of potatoes so purchased or sold and that Dealer will pay said amount to CCC, as compensation and not as a penalty. Inasmuch as payment of \$4.00 is not intended to take the place of any obligation of Dealer to refund to CCC any monies which he collected without being entitled thereto, this provision for liquidated damages or payment of such damages shall not preclude or invalidate claims of CCC for such refunds. Neither shall this provision exclude any other relief, at law or in equity, to which CCC may be entitled apart from its claim for damages.

Plaintiff's Exhibit No. 2—(Continued)

Article 11. Agency.

In carrying out the directions or authorizations of CCC to purchase, sell, transport, or otherwise dispose of potatoes, Dealer shall not act as agent of CCC, except as specifically provided for in this agreement.

Article 12. Cancellation.

Either party hereto may, without liability to the other, cancel this agreement at any time by giving 30 days notice in writing. The cancellation shall become effective at the close of business on the 30th day following the date of sending or delivering the notice. However, both parties shall continue to perform this agreement on the basis of directions or authorizations issued by CCC prior to or during said 30 day period, though such performance may require action after the expiration of such period.

For breach of any provision of this agreement by Dealer as determined by CCC, whose determination shall be final, CCC may cancel this agreement forthwith by written notice, such cancellation to become effective upon the receipt of the notice by Dealer.

Article 13. Claim for Payment.

Payment will be made by CCC to dealer as soon as practicable after Dealer has submitted a claim properly executed as prescribed by CCC on "Public Voucher—Purchase Programs," Form CCC-125, and supported by documentary evidence of compliance with the terms of this agreement as follows:

(A) For every lot of potatoes on which a claim is made for payment, Dealer shall submit two copies

Plaintiff's Exhibit No. 2—(Continued)
of a Federal State Inspection Certificate covering the particular lot of potatoes. Such certificate must show the grades or qualities of such potatoes.

(B) For sales in outlets other than domestic food and seed markets the Dealer shall submit in addition to Inspection Certificates, (i) two copies of each invoice on which the purchaser has executed a receipt for the quantity of potatoes invoiced and a statement that the purchaser has made or will make payment at the price(s) stated on the invoices, and (ii) two copies of an agreement by the purchaser, as required in Article 8 hereof. The documentation required in (i), and (ii), of this paragraph may be combined in one document constituting an "Invoice, Receipt, and Agreement." Such documents shall identify the potatoes sold by reference to the lot number(s) and Inspection Certificate number(s).

(C) For potatoes delivered to CCC or to others for the account of CCC, the Dealer shall obtain, in addition to the Inspection Certificate, original and two copies of a Consignee's Receipt or three copies of the Commercial Bill of Lading or one yellow copy of Government Bill of Lading for use as follows: (i) the original and one copy of Consignee's Receipt or two copies of Commercial Bill of Lading will be submitted to the authorized Representative of CCC immediately after delivery or shipment; (ii) one copy of Consignee's Receipt or one copy of the Commercial Bill of Lading or the yellow copy of the Government Bill of Lading will be attached to Dealer's claim for payment.

(D) For potatoes sold below support prices as

Plaintiff's Exhibit No. 2—(Continued)

provided in Article 5 hereof, the Dealer shall submit, in addition to the Inspection Certificate, two copies of each invoice to the purchaser, bearing purchaser's acknowledgment of delivery. In lieu of such receipted invoices Dealer may submit two copies of each invoice to the purchaser and one copy of satisfactory evidence of delivery. Such evidence of delivery may include, but is not limited to a signed copy (signature may be by carbon impression) of a commercial bill of lading or trucker's receipt showing name of purchaser, a consignee's receipt, or a receipt signed by a person who represents the consignee such as "manager" or "receiving clerk."

(E) For potatoes disposed of in a manner prescribed by CCC other than is covered by paragraphs (B), (C), and (D) of this Article, the Dealer shall submit, in addition to the Inspection Certificate, the original and one copy of a certificate executed by a designated representative of CCC showing the quantity of potatoes and certifying that such potatoes were disposed of in the manner directed.

(F) To facilitate payment, a separate claim should be prepared by the Dealer to cover transactions referred to in each of the paragraphs (B), (C), (D), and (E) of this Article.

Example: A properly executed voucher, Form CCC-125, and supporting documents required by paragraph (B) of this Article, will constitute a claim in connection with sales made in outlets other than food and seed markets. The amount due CCC from proceeds of such sales should be computed by Dealer and shown as a deduction on the voucher or on a

Plaintiff's Exhibit No. 2—(Continued)

summarized statement attached to the voucher. When summarized statements are furnished by Dealer, an original and two copies must be attached to the voucher.

Article 14. Reports and Examination of Books and Records.

Dealer agrees to maintain books and records adequate for verification of operations pursuant to this agreement and to furnish such reports as are requested by CCC, subject to the approval of the Bureau of the Budget. Such books and records shall be available to CCC for inspection and verification during regular business hours at the office of the Dealer. Dealer further agrees to allow CCC during regular business hours, or at any other reasonable time, to inspect the Dealer's premises and operations to determine compliance with this agreement. The books and records maintained by Dealer pursuant to this Article shall show (i) name and address of each vendor from whom he purchased potatoes or for whom he sold potatoes, (ii) the quantities by grades, sizes, and condition for market (such as, bulk loaded, sack loaded, etc.), and the price paid by Dealer for each grade and size. When Dealer purchases potatoes of grades or qualities other than those for which prices are established in Price Support Announcements issued by the United States Department of Agriculture, such books and records shall show the quantities, grades and sizes, and the prices paid or returned to grower for each grade and size, as computed at the time of purchase. In addition to the

Plaintiff's Exhibit No. 2—(Continued)

above records, Dealer may obtain and retain in his files a statement signed by the vendor and Dealer setting for the quantities by mutually agreed grades, sizes, and prices of the potatoes purchased. Such statement, with respects to potatoes, will be acceptable to CCC as evidence relating to payment of the equivalent of applicable support prices by the Dealer.

Article 15. Waiver.

CCC may, in its absolute discretion, waive compliance on the part of the Dealer with any requirements of this agreement with respect to any one or more transactions. To be effective, however, such waiver must be in writing, signed by a Contracting Officer of CCC, and approved by the Director, or Acting Director, Fruit and Vegetable Branch, Production and Marketing Administration.

Article 16. Officials Not to Benefit.

No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit and shall not extend to any benefits that may accrue to a member of or Delegate to Congress or Resident Commissioner in his capacity as a farmer (41 U.S.C. 22; 18 U.S.C. 204-6).

Note: The record keeping requirements of this agreement have been approved by the Bureau of the

Plaintiff's Exhibit No. 2—(Continued)

Budget in accordance with the Federal Reports Act of 1942.

/s/ H. H. SIMMONS & SONS,
Dealer.

By /s/ H. H. SIMMONS,
Manager and Owner.

COMMODITY CREDIT CORPORATION,

/s/ CLAUS W. PETERS,
Contracting Officer.

United States Department of Agriculture
Production and Marketing Administration

APPROVED 1948 POTATO MARKETING
SERVICE CHARGES

Service	Sacked F.O.B. Car	Bulk F.O.B. Car
1. Hauling	\$.05	\$.05
2. Washing or Cleaning	xxx	.xxx
3. Grading .....	.125	.125
4. Sacking .....	.025	xxx
5. Sack Cost (New)....	.25	xxx
6. Loading .....	.025	.075
7. Inspection .....	.0175	.0175
8. Selling .....	.05	.05
	<hr/>	<hr/>
Total.....	\$5425	xxx

PLAINTIFF'S EXHIBIT No. 3

Form 48—Potatoes—3

United States Department of Agriculture
Production and Marketing Administration

PC-3b-91

Contract No. A8pm(Fx)74

1948 POTATO DEALER AGREEMENT

This Agreement, made and entered into this 28th day of July, 1948, by and between Pasco Growers of Kennewick, Washington (hereinafter referred to as "Dealer") and the Commodity Credit Corporation, an agency of the United States (hereinafter referred to as "CCC").

Witnesseth That:

[Printer's Note: Articles 1 to 16 are similar to Articles 1 to 16, Plaintiff's Exhibit No. 2, and for economy are not reproduced here.]

* * * *

/s/ PASCO GROWERS ASSN.,

By /s/ D. B. BAKER,
Manager.

COMMODITY CREDIT CORPORATION,

/s/ CLAUD W. PETERS,
Contracting Officer.

[Printer's Note: Approved 1948 Potato Marketing Service Charges are similar to Plaintiff's Exhibit No. 2 Services Charges.]

PLAINTIFF'S EXHIBIT No. 4

United States Department of Agriculture
Production and Marketing Administration

Announcement No. FV-91-2

Contract No. A8pm(Fs)781 Program PC-3b-91-3

ANNOUNCEMENT OF SALE OF FRESH
IRISH POTATOES FOR LIVESTOCK
FEED

The United States Department of Agriculture and the Commodity Credit Corporation, an agency of the United States within the United States Department of Agriculture (both being hereinafter referred to as USDA), may have fresh Irish potatoes available from time to time for sale as livestock feed. These potatoes will have been acquired under the Irish Potato Price Support Program.

Potatoes for livestock feed will be sold subject to the terms and conditions set forth in Form FV-111 and at the following prices:

Delivered sacked, Government Point of Purchase or Storage \$.10 cwt. in the State of Washington.

How to Obtain Potatoes for Livestock Feed

Prospective purchaser will fully execute the order as indicated below and after execution will forward this entire form to John Chinn, Purchase Representative, located at 201 Old Court House, Yakima, together with certified or cashier's check or postal money order payable to the Treasurer of the United States for the full amount of the purchase price for the potatoes he desires to purchase at the applicable

Plaintiff's Exhibit No. 4—(Continued)

price stated above. No order will be filled for less than minimum carloads unless purchaser agrees to accept delivery at the point of purchase by USDA and arranges for his own hauling.

A contract will come into existence with reference to a quantity of potatoes when such quantity is loaded on cars or trucks at shipping point.

/s/ CLAUD W. PETERS,

Representative of the Secretary of Agriculture and Contracting Officer, Commodity Credit Corporation.

ORDER

(To be filled in and signed by prospective purchaser)

I/We the undersigned hereby offer to purchase 11,000 cwt. of fresh Irish potatoes, Government Point of Purchase or Storage, \$.10 cwt. in the State of Washington—sacked (strike out phrase not applicable) and warrant that the potatoes will be used only for feeding livestock.

Name of purchaser and Consignee: C. F. Williamson. Date: Aug. 19, 1948. Address: Sunnyside, Washington.

Destination: Sunnyside.

Delivering Carrier: Truck.

Delivery Schedule (date and quantity): 50 ton a day.

I/We agree to take delivery at USDA point of purchase and I/We will do our own hauling.

I/We have read the terms and conditions of this sale as set forth herein and in Form 111, "Terms and

Plaintiff's Exhibit No. 4—(Continued)
Conditions for Sale of Fresh Irish Potatoes for Live-
stock Feed'' and agree fully to abide by such terms
and conditions.

/s/ C. F. WILLIAMSON,
Signature of Purchaser.

RECEIPT

Receipt is hereby acknowledge of the above order
and payment in the amount of \$1,100.00 covered by
No. 9 4729 and No. 9 4874 Aug. 19 and Sept. 22, 1948.

Date: September 22, 1948.

/s/ JOHN CHINN,
Purchase Representative.

PLAINTIFF'S EXHIBIT No. 5

Form FV-111

United States Department of Agriculture
Production and Marketing Administration
Fruit and Vegetable Branch, Washington, D. C.

TERMS AND CONDITIONS FOR SALE OF FRESH IRISH POTATOES FOR LIVESTOCK FEED

Use: Purchaser agrees to use the potatoes deliv-
ered pursuant to his order for the sole purpose of
feeding such potatoes to livestock. Title to the pota-
toes shall not pass to the purchaser until the potatoes
delivered are actually fed to livestock or processed
into feed for livestock.

Failure or Delay in Deliveries: The United States

Plaintiff's Exhibit No. 5—(Continued)

Department of Agriculture and the Commodity Credit Corporation are hereinafter referred to as USDA. USDA does not guarantee the delivery to purchaser under the order of any specified quantity of potatoes at any specified rate or time, and there shall be no liability on the part of USDA for any failure or delay in filling the order, except that USDA shall refund to the purchaser the price paid with respect to any quantity of potatoes not delivered within a reasonable time after the scheduled delivery date.

Quality and Mode of Delivery: The potatoes to be delivered pursuant to this order are expected to be loaded in bulk. However, USDA reserves the right at its option, to make delivery in bags. At the discretion of USDA the potatoes may be stained by the use of a vegetable coloring which will not affect their use or fitness for stock feed. Quantities shipping by common carrier will be loaded in accordance with applicable regulations governing the use of cars for shipment of potatoes for the purpose for which they were sold. Cars will be loaded with not less than the applicable minimum carload weight. USDA gives no warranty as to grade, quality or condition of any potatoes to be delivered except that no lot shall have more than 2 per cent soft rot when inspected at government point of purchase. The purchaser shall assume all risk as to grade, quality or condition after such inspection. If sale is made f.o.b. government shipping point, freight charges will be paid by the purchaser. If sale is made f.o.b. destination, freight charges will be paid by USDA.

Plaintiff's Exhibit No. 5—(Continued)

Over and Under Delivery: Purchaser hereby agrees to pay USDA for any overage in delivery not to exceed 10 per cent of a particular carload or truckload and such payment shall be made within 15 days of receipt of invoices. USDA agrees to refund to the purchaser any amount due because of under-delivery. Determination of weights as established by USDA shall be final.

Determination of Weights: The weight of the potatoes delivered shall be established at the option of USDA on the basis of (a) USDA's purchase weight certificate or (b) cubic measurement as certified by the County Agricultural Conservation Committee, or (c) truck scale weights or (d) number of containers delivered multiplied by net weight per container as determined by USDA.

Records: Representative of USDA shall at any reasonable time have access to purchaser's premises, and other facilities in order to determine that the potatoes were, or are being used in accordance with the terms and conditions of the contract.

Compliance: It is understood that USDA would not deliver potatoes pursuant to this order if the purchaser did not warrant that they would be used only for feeding livestock. Since failure on the part of the purchaser to use the potatoes solely for feeding livestock will cause serious and substantial damage to USDA and since it will be difficult to establish the exact amount of such damage, purchaser agrees if the potatoes are utilized in any form for human food or for any other purpose except for feeding

Plaintiff's Exhibit No. 5—(Continued)

livestock, to pay USDA in addition to any other charges that may be due USDA with respect to the potatoes, as compensation and not as penalty, liquidated damages at the rate of \$4.00 per cwt. or fraction thereof, with respect to any quantity of the potatoes used for human food and at the rate of \$1.00 per cwt. with respect to any quantity used for purposes other than human food and livestock feeding. If potatoes are used for purposes other than feeding livestock, it shall be presumed that they have been used for human food, and the burden of proving that they have been used for some other purpose shall be on the purchaser. This provision shall not exclude any other form of relief to USDA, at law or in equity, including relief by injunction, in case the purchaser breaches this contract.

Officials Not To Benefit: No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of the contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to the contract if made with a corporation for its general benefit and shall not extend to any benefits that may accrue from the contract to a Member of or Delegate to Congress or a Resident Commissioner in his capacity as a farmer. (41 U.S.C. §22, 18 U.S.C. §204-8).

PLAINTIFF'S EXHIBIT No. 6

Form FV-47 (Washington)

191370-E

United States Department of Agriculture
Production and Marketing Administration
State of Washington Department of Agriculture

INSPECTION CERTIFICATE

This certificate is issued in compliance with the regulations governing the inspection of various products pursuant to the Act making appropriations for the United States Department of Agriculture and Statutes of the State of Washington, and is admissible as prima facie evidence in all courts of the United States and of Washington. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

Inspection point: Sunnyside, Wash.

Inspection begun: 8:45 a.m., August 23, 1948.

Completed: 6 p.m., Aug. 23, 1948.

Applicant: H. H. Simmons & Sons. Address: Sunnyside, Wash.

I, the undersigned, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify that the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as stated below:

Where Inspected: In warehouse of applicant as being loaded on trucks.

Plaintiff's Exhibit No. 6—(Continued)

Products: White Rose Potatoes, 445 used 100 lb. sacks, Paramount Brand, marked U. S. No. 1.

Size: Generally $1\frac{7}{8}$ inches in diameter to 24 ounces. Undersize within tolerance.

Quality and condition: Potatoes are firm, clean, slightly to badly skinned and fairly well shaped. No soft rot. Grade defects average within tolerances.

Grade: U. S. No. 1, Class ZZZ.

Certification of Count

I, the undersigned inspector, do hereby certify that I personally counted the sacks of potatoes after loading on trucks bearing Washington State license TKE 10170 and TLE 1190 and that the count of 445 100-lb. sacks reported in the Products statement above is correct. Transportation of the lot was accomplished in two trips with loads of 315 and 130 sacks per trip; applicant states potatoes are to be delivered to C. F. Williamson, Sunnyside, Wash.

Fee: \$9.10.

/s/ JOHN R. CATLIN,
Inspector.

PLAINTIFF'S EXHIBIT No. 7

Form CCC-125

Serial No. A800029

U. S. Department of Agriculture
Production and Marketing Administration
Commodity Credit Corporation

PUBLIC VOUCHER—PURCHASE
PROGRAMS

(Agricultural commodities and related services)

Bu. Voucher No.: 48-P-2597.

Paid by: C-127113 10-4-48.

Voucher prepared at Yakima, Washington.

Date: September 11, 1948.

United States, Dr., To H. H. Simmons & Sons,
Payee. Payee's Account No. 1343 JC.

Lienholder as joint payee: None.

Payee's address: Box 381, Sunnyside, Wash.

Address to which check shall be mailed: Same.

(Delivery or Service): Date: 8-24-48.

Program No. and Title: PC-3b-91-3.

(Contract Date): June 20, 1948.

(Contract No.): A8pm(Fx)44.

Livestock Feed: A8pm (FS-781).

(Purchase Order No.): PC-3b-91-1.

Description of Transaction: Fresh Irish Potatoes.
U. S. No. 1. Quantity (No. of units): 445. Unit: 100
lb. sacks. Amount Claimed per Unit: 2.20. Amount
Claimed: \$979.00. Total, \$979.00.

Plaintiff's Exhibit No. 7—(Continued)

Marketing charges not allowed. 10c reduction for used bags.

Account verified correct for \$979.00 (Signature or initials): TSP.

Shipping point: Sunnyside, Washington.

Destination: Sunnyside, Washington. Weight of Shipment: 44945. Trk. Lic. No. or Car No. TKE 10170. TLE 1190. Commercial Use: None.

Certificate of Vendor

I certify that the above bill is correct and just; that payment therefor has not been received; that the commodity or service listed herein has been delivered to or performed for the Commodity Credit Corporation; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; that State or local sales taxes are not included in the amounts billed; and that I have the sole ownership or interest in the listed commodity or services, that they are free from any or all liens and encumbrances except for equities owned by the lienholder(s) named above.

Date: 9/15/48.

/s/ H. H. SIMMONS & SONS,
Contracting Dealer.

By /s/ H. H. SIMMONS,
Manager.

Certificate of Receipt

I certify that the commodity described, after having passed proper inspection, was received and accepted in good condition in the quantities stated, for and on behalf of the Commodity Credit Corporation, or if services, that such services were performed as stated.

Date: 9-15-48.

/s/ JOHN CHINN,
Receiving Agent.

Certificate of Certifying Officer

Pursuant to authority vested in me, I certify that the above bill is correct and just and is approved for payment in the amount of \$979.00.

Date: Sept. 28, 1948.

/s/ THOMAS S. PARKE,
Admin. Asst.

PLAINTIFF'S EXHIBIT No. 8

Form FV-47 (Washington)

No. 171376-E

United States Department of Agriculture
Production and Marketing Administration
State of Washington Department of Agriculture

INSPECTION CERTIFICATE

This certificate is issued in compliance with the regulations governing the inspection of various products pursuant to the Act making appropriations for the United States Department of Agriculture

Plaintiff's Exhibit No. 8—(Continued)

and Statutes of the State of Washington, and is admissible as prima facie evidence in all courts of the United States and of Washington. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

Inspection point: Sunnyside, Wash.

Inspection begun: 8 a.m., Aug. 24, 1948.

Completed: 12:30 p.m., Aug. 24, 1948.

Applicant: Pasco Growers Assoc., Sunnyside, Wash.

I, the undersigned, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify that the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as stated below:

Where Inspected: At warehouse of applicant as being loaded on trucks.

Products: White Rose Potatoes, 200 used 100 lb. sacks, Blue Mountain Brand, marked U. S. No. 1. 59 used 100 lb. sacks, no brand, no grade marks.

Size: Generally $1\frac{7}{8}$ inches in diameter to 24 ounces. Undersize within tolerance.

Quality and condition: Potatoes are firm, clean, slightly to badly skinned, and in U. S. No. 1 lot fairly well shaped. Each lot, less than $\frac{1}{2}$ of 1% soft rot. Each lot, grade defects average within tolerances.

Grade: Blue Mountain Brand, U. S. No. 1. No brand, U. S. No. 2 ($1\frac{7}{8}$ -inch minimum) Class X.

Plaintiff's Exhibit No. 8—(Continued)

Certification of Count

I, the undersigned inspector, do hereby certify that I personally counted the sacks of potatoes after loading on trucks bearing Washington State license Nos. TKE 7015 and 10173, and that the count of 259 100-lb. sacks reported in the Products statement above is correct. Transportation of the lot was accomplished in two trips with loads of 208 and 51 sacks carried per trip. Truck drivers stated that loads were to be delivered to C. F. Williamson, Sunnyside, Wash.

Fee: \$7.00.

/s/ JOHN B. KERBY,
Inspector.

PLAINTIFF'S EXHIBIT No. 9

Form CCC-125

Serial No. B-124456

U. S. Department of Agriculture
Production and Marketing Administration
Commodity Credit Corporation

PUBLIC VOUCHER—PURCHASE
PROGRAMS

(Agricultural commodities and related services)
Bu. Voucher No. 6049.

Paid by: C-131591 10-28-48.

Voucher prepared at Yakima, Washington.

Date: Oct. 7, 1948.

United States, Dr., To: Pasco Growers' Assn.
(Payee's Account No.): 1355.

Plaintiff's Exhibit No. 9—(Continued)

Lienholder as joint payee: None.

Payee's address: Sunnyside, Washington. Address to which check shall be mailed: Same.

(Delivery or Service): Date: 8-24-48.

Program No. and Title: PC-3b-91-3.

(Contract Date): July 29, 1948.

(Contract No.): A8pm(Fx) 74/2/8.

(Delivery Order No.): A8pm(FS-781).

(Shipping Order No.): Livestock Feed.

(Purchase Order No.): PC-3b-91-1.

Description of Transaction (state quality and grade of commodity): Fresh Irish Potatoes, U.S. No. 1; Quantity (No. of units), 200; Unit, 100 lb. sacks; Amount Claimed per unit, 2.20; Amount Claimed, 440.00. U. S. No. 2: Quantity (No. of units), 59; Unit, 100 lb. sacks; Amount Claimed per unit, 1.05; Amount Claimed, 61.95. Total: 501.95.

Marketing charges not allowed. 10c reduction for used bags.

Account verified; correct for: 501.95. (Signature or initials): KL.

Shipping point: Sunnyside, Washington.

Destination: Sunnyside, Washington. Weight of Shipment, 26159. Trk. Lic. No. or Car No.: TKE 7015, 10173.

Certificate of Vendor

I certify that the above bill is correct and just; that payment therefor has not been received; that the commodity or service listed herein has been delivered to or performed for the Commodity Credit Corporation; that all statutory requirements as to American production and labor standards, and all

Plaintiff's Exhibit No. 9—(Continued)
conditions of purchase applicable to the transactions have been complied with; that State or local sales taxes are not included in the amounts billed; and that I have the sole ownership or interest in the listed commodity or services, that they are free from any or all liens and encumbrances except for equities owned by the lienholder(s) named above.

Date: 10-13-48.

/s/ PASCO GROWERS ASSN.
Office Manager,
By /s/ D. D. ROCHAT,
Contracting Dealer.

Certificate of Receipt

I certify that the commodity described, after having passed proper inspection, was received and accepted in good condition in the quantities stated, for and on behalf of the Commodity Credit Corporation, or if services, that such services were performed as stated.

Date: 10-13-48.

/s/ JOHN CHINN,
Receiving Agent.

Certificate of Certifying Officer

Pursuant to authority vested in me, I certify that the above bill is correct and just and is approved for payment in the amount of \$501.95.

Date: 10/26/48.

/s/ THOMAS S. PARKE,
Admin. Asst.

PLAINTIFF'S EXHIBIT No. 10

Form PMA-375

U. S. Department of Agriculture
Production and Marketing Administration
Shipping and Storage Branch

CONSIGNEE'S RECEIPT

Budget Bureau No. 40-R1353.1. Approval Expires
Dec. 31, 1948. Date 8-23-48. Sales Contract No. or
Requisition No. A8pm(FS-781).

Consignee and Address: C. F. Williamson, Sunnyside, Washington.

Place of Acceptance: (Consignor and address):
H. H. Simmons & Sons, Sunnyside, Washington.

Item No. 1; Commodity & Code, Fresh Irish Potatoes; No. and Kind of Packages, 445 No. 1 (U.S.) 100 lb. sacks; Net Weight, 44500; Gross Weight, 44945; Ex-Car No., TKE 10170 TLE 1190; Ex-Order No., Purchase No. 1343; Outbound Order No., PC-3b-91-3.

This is to certify that the property herein described has been received as shown above. It was received in good condition except as noted on the reverse side, identified by item(s) above.

/s/ C. F. WILLIAMSON,
Signature of Consignee.

PLAINTIFF'S EXHIBIT No. 11

Form PMA-375

U. S. Department of Agriculture
Production and Marketing Administration
Shipping and Storage Branch

CONSIGNEE'S RECEIPT

Budget Bureau No. 40-R1353.1. Approval Expires
December 31, 1948. Date: 8-24-48. Sales Contract
No. or Requisition No. A8pm(FS-781).

Consignee and Address: C. F. Williamson, Sunny-
side, Wn.

Place of Acceptance (Consignor and Address):
Pasco Growers Ass'n, Sunnyside, Wn.

Item No. 1; Commodity and Code, Fresh Irish
Potatoes; No. and Kind of Packages, 200 100-lb.
sacks No. 1 (net weight 20,000, gross weight 20,200),
No. and kind of packages, 59 100-lb. sacks U.S. No. 2
(net weight 5900, gross weight 5959); Ex-Car No.,
TKE 7015 and 10173; Ex-Order No., Purchase No.
1355; Outbound Order No., PC-3b-91-3.

This is to certify that the property herein de-
scribed has been received as shown above. It was re-
ceived in good condition except as noted on the re-
verse side, identified by item(s) above.

/s/ C. F. WILLIAMSON,
Signature of Consignee.

PLAINTIFF'S EXHIBIT No. 12

United States Department of Agriculture
Production and Marketing Administration
Spokane, Washington

Announcement No. FV-91-2.

Contract No.: A8pm(Fs)1641.

Program: PC-3b-91-3.

ANNOUNCEMENT OF SALE OF FRESH
IRISH POTATOES FOR LIVE-
STOCK FEED

The United States Department of Agriculture and the Commodity Credit Corporation, an agency of the United States within the United States Department of Agriculture (both being hereinafter referred to as USDA), may have fresh Irish potatoes available from time to time for sale as livestock feed. These potatoes will have been acquired under the Irish Potato Price Support Program.

Potatoes for livestock feed will be sold subject to the terms and conditions set forth in Form FV-111 and at the following prices:

Delivered sacked, Government Point of Purchase or Storage \$.10 cwt. in the State of Washington.

How to Obtain Potatoes for Livestock Feed

Prospective purchaser will fully execute the order as indicated below and after execution will forward this entire form to John Chinn, Purchase Representative, located at 201 Old Court House, Yakima, Wash., together with certified or cashier's check or postal money order payable to the Treasurer of the United States for the full amount of the purchase

Plaintiff's Exhibit No. 12—(Continued)

price for the potatoes he desires to purchase at the applicable price stated above. No order will be filled for less than minimum carloads unless purchaser agrees to accept delivery at the point of purchase by USDA and arranges for his own hauling.

A contract will come into existence with reference to a quantity of potatoes when such quantity is loaded on cars or trucks at shipping point.

/s/ CLAUD W. PETERS ,

Representative of the Secretary of Agriculture and
Contracting Officer, Commodity Credit Corpora-
tion.

ORDER

(To be filled in and signed by prospective purchaser)

I/We the undersigned hereby offer to purchase 4100 cwt. of fresh Irish potatoes, Government Point of Purchase or Storage, \$.10 cwt. in the State of Washington, sacked, and warrant that the potatoes will be used only for feeding livestock.

Name of purchaser and consignee: Melvin E. Waller. Date: Aug. 25, 1948. Address: Sunnyside, Washington. Destination: Sunnyside. Delivering Carrier: Truck. Delivery Schedule (date and quantity): 50 ton a day.

I/We agree to take delivery at USDA point of purchase and I/We will do our own hauling.

I/We have read the terms and conditions of this sale as set forth herein and in Form 111, "Terms and Conditions for Sale of Fresh Irish Potatoes for Livestock Feed" and agree fully to abide by such terms and conditions.

/s/ MELVIN E. WALLER,
Signature of Purchaser.

Plaintiff's Exhibit No. 12—(Continued)

RECEIPT

Receipt is hereby acknowledged of the above order and payment in the amount of \$410.00 covered by (number and date of certified check or postal money order) 918748, 918749, 918750 and No. 9 1469, Aug. 25 and Sept. 23, 1948.

Date: September 24, 1948.

/s/ JOHN CHINN,
Purchase Representative.

PLAINTIFF'S EXHIBIT No. 13

[Printer's Note: Plaintiff's Exhibit No. 13 is identical to Plaintiff's No. 5, set out in full at page 310 of this printed Record.]

DEFENDANT'S EXHIBIT No. 14

August 19, 1948

This certifies that C. F. Williamson has made a Contract with our office for 500 ton of potatoes for livestock feed.

/s/ JOHN CHINN,
Purchase Representative.

PLAINTIFF'S EXHIBIT No. 15

Caruso Produce, Inc.
Wholesale Fruit and Produce Distributors

S. E. Belmont at 10th Ave.

Portland, Oregon

No. 2372

Date: 8/25/48

PURCHASE ORDER

We have this day purchased from Hathaway Farms by Homer Waller the following:

323 sacks No. 1 Spuds; price, \$2.10; amount, \$678.30.

[Stamped]: Aug. 25, 1948, Caruso Produce, Inc.,
by 3197.

Received payment:

/s/ H. WALLER.

Authorized by:

JOE CARUSO.

PLAINTIFF'S EXHIBIT No. 17

[Cancelled Check]

Caruso Produce, Inc. No. 3197
935 S. E. Belmont St., East 1119
Portland 14, Oregon. 8/25/48

[Stamped]: Certified \$678.30

[Stamped]: Caruso Produce, Inc., \$678 and 30cts.
Hathaway Farms

By /s/ JOE N. CARUSO,
By /s/ SAM J. CARUSO.

Citizens Branch The United States National Bank,
Portland, Oregon.

[Signatures on reverse side]: Hathaway Farms
by K. Hathaway.

DEFENDANT'S EXHIBIT No. 18

August 25, 1948

This certifies that Melvin Waller has signed a Contract with our office for 149 tons of potatoes for livestock feed.

/s/ JOHN CHINN,
Purchase Representative.

PLAINTIFF'S EXHIBIT No. 19

Federal No. 25

Date	From	To	Return to	Ore. Miles	Total Miles	Gas Used	Driver
July 2	Sunnyside	Spokane	Sunnyside		410	128.1	J.D.
3	Sunnyside	Mosier	Sunnyside	84	244	82.2	J.D.
						5.7	
						95.6	
Aug. 6	Sunnyside	Seattle	Sunnyside		410	92.8	J.D.
9	Sunnyside	Grandview			7	80.2	"
9	Grandview	Portland	Sunnyside	32	407	75.7	"
13	Sunnyside	Grandview			7	28.1	"
13	Grandview	Tacoma			247	82.0	"
13	Tacoma	Prosser	Sunnyside		268	20.1	"
16	Sunnyside	Grandview			7	90.5	"
16	Grandview	Portland		16	217	83.3	"
16	Portland	Grandview	Sunnyside	16	224	10.0	"
19	Sunnyside	Grandview			7	39.3	"
19	Grandview	Tacoma			247	80.6	"
19	Tacoma	Grandview	Sunnyside		254	65.6	"
24	Sunnyside	Portland	Sunnyside	32	414	75.6	"
25	Sunnyside	Portland	Sunnyside	32	414	100.0	"

[Endorsed]: No. 12232. United States Court of Appeals for the Ninth Circuit. Melvin E. Waller, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed April 25, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12232

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MELVIN E. WALLER,
Defendant-Appellant.

STATEMENT OF POINTS AND DESIGNA-
TION UNDER RULE 19, SUBDIVISION 6

In compliance with Rule 19, Subdivision 6 of the rules of the above-entitled Court, the appellant herewith adopts the Statement of Points filed in the United States District Court for the Eastern District of Washington, Southern Division, as the statement of the points upon which he intends to rely on this appeal.

In further compliance with said rule the appellant designates, as that portion of the record which is material to the consideration of this appeal, all the certified record, pages 1 to 324 inclusive, which is filed in this Court.

Dated this 20th day of April, 1949.

/s/ WALTER J. ROBINSON, JR.,
Of Counsel for Defendant-Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 26, 1949. Paul P. O'Brien,
Clerk.

In the
United States Court of
Appeals
FOR THE NINTH CIRCUIT

MELVIN E. WALLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12232

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

JOHN GAVIN
WALTER J. ROBINSON, Jr.
Miller Building
Yakima, Washington

JAMES P. SALVINI
Sunnyside, Washington
Attorneys for Appellant.

FILED

JUL 12 1949

PAUL P. O'BRIEN,
CLERK

In the
United States Court of
Appeals

FOR THE NINTH CIRCUIT

MELVIN E. WALLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12232

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BRIEF OF APPELLANT

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Sunnyside, Washington
Attorneys for Appellant.

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STATEMENT REGARDING JURISDICTION

This action was commenced in United States District Court by a grand jury indictment of the appellant, charging him with the theft of property of the Commodity Credit Corporation in violation of 15 U.S.C.A. §714m (c). (Public Law 806 of the 80th Congress, Section 15, Paragraph (c)). (R. 2). The District Court had jurisdiction under 18 U.S.C.A. § 3231.

The appellant was found guilty as charged in the Indictment (R 3), sentenced, and the final Judgment and Commitment entered by the District Court. (R 6, 7).

This case comes within the usual appellate jurisdiction of the United States Court of Appeals upon appeal from a final decision of the United States District Court. 28 U.S.C.A. § 1291. The judgment of the District Court was entered on March 11, 1949, and Notice of Appeal was filed March 17, 1949. (R 7, 8).

STATEMENT OF THE CASE

The appellant was charged in the District Court with violating Section 714m of Title 15 of the United States Code (Public Law 806-80th Congress, Section 15, Paragraph (c)), reading in part as follows:

“(c) Whoever shall willfully steal, conceal, remove, dis-

(All numerical references herein, unless otherwise indicated, are to the pages of the printed Transcript of Record. All italics are supplied by counsel).

pose of, or convert to his own use or to that of another property owned or held by, or mortgaged or pledged to the (Commodity Credit) Corporation shall, upon conviction thereof, be punished by a fine of not more than five years, or both."

The jury found the appellant guilty as charged, and the principal question involved on this appeal is whether the property in question was "owned" by the Commodity Credit Corporation at the time it was taken by the appellant. The property involved was surplus potatoes which had been sold and delivered to an individual named Charles F. Williamson and paid for by him, pursuant to the provisions of a contract with the Commodity Credit Corporation. (Pl. Ex. 4, R 308). That contract refers to a certain "Form 111—Terms and Conditions for Sale of Fresh Irish Potatoes for Livestock Feed," with the provisions of which Form 111 the purchaser agreed to abide. Form 111 (Pl. Ex. 5, R 310) contained a provision that the "*title* to the potatoes shall not pass to the purchaser until the potatoes delivered are actually fed to the livestock or processed into feed for livestock."

The potatoes in question were diverted by the appellant from livestock feed channels.

The District Court held that although the potatoes had been sold by the Commodity Credit Corporation, delivered to, paid for and hauled away by the purchaser or for his account, they were still "owned" by the Commodity Credit

Corporation until actually fed to livestock or processed into livestock food. Appellant denies this proposition. He contends that the above quoted statute has been improperly applied to this case, that there is no evidence that the potatoes taken by him were then owned by the Commodity Credit Corporation, and that his motions for judgment of acquittal should have been granted by the District Court.

Other questions involved on this appeal are whether there is substantial evidence to sustain the judgment of conviction, and whether the District Court erred in admitting evidence with regard to the appellant's purchase of potatoes from the Commodity Credit Corporation *subsequent* to the offense charged and not related to it.

The appellant Melvin E. Waller is now and for approximately three years last past has been president of the Herrett Trucking Company, which is engaged in general inter-state and intra-state truck hauling. The principal place of business of the company is Sunnyside, Washington. The appellant resides with his family on his twenty-seven acre farm about two miles and a half south of Sunnyside, and in the month of August, 1948, was pasturing about forty head of beef cattle on his farm. (R 184, 186).

One Charles F. Williamson resides on a farm adjoining the appellant's farm, and the appellant and Williamson were very close friends. (R 181, 187). For approximately two years they had handled jointly purchase and sale opera-

tions and activities, had loaned and borrowed many items back and forth, and had jointly engaged in numerous matters with third parties. (R 181, 187).

Williamson grew potatoes during the 1948 crop season under the potato price support program which was administered by the Commodity Credit Corporation. Under that program, the Commodity Credit Corporation acquired a considerable portion of Williamson's crop of No. 1 potatoes. (Pl. Ex. 1-11, R 22, 286-324).

A few days before the date of the offense charged in the indictment, Williamson called at the Commodity Credit Corporation office at Yakima, Washington, and there signed the order which was in the form of "Announcement No. FV-91-2" (Pl. Ex. 4, R 308), as follows:

United States Department of Agriculture
Production and Marketing Administration

Announcement No. FV-91-2

Contract No. A8pm(Fs)781

Program PC-3b-91-3

ANNOUNCEMENT OF SALE OF FRESH IRISH POTATOES FOR LIVESTOCK FEED

The United States Department of Agriculture and the Commodity Credit Corporation, an agency of the United States within the United States Department of Agriculture (both being hereinafter referred to as USDA), may have fresh Irish potatoes available from time to time for sale as livestock feed. These potatoes will

have been acquired under the Irish Potato Price Support Program.

Potatoes for livestock feed will be sold subject to the terms and conditions set forth in Form FV-111 and at the following prices:

Delivered sacked, Government Point of Purchase or Storage, \$.10 cwt. in the State of Washington.

How to Obtain Potatoes for Livestock Feed

Prospective purchaser will fully execute the order as indicated below and after execution will forward this entire form to John Chinn, Purchase Representative, located at 201 Old Court House, Yakima, together with certified check or cashier's check or postal money order payable to the Treasurer of the United States for the full amount of the purchase price for the potatoes he desires to purchase at the applicable price stated above. No order will be filled for less than minimum carloads unless purchaser agrees to accept delivery at the point of purchase by USDA and arranges for his own hauling.

A contract will come into existence with reference to a quantity of potatoes when such quantity is loaded on cars or trucks at shipping point.

/s/ CLAUD W. PETERS,

Representative of the Secretary of Agriculture and Contracting Officer, Commodity Credit Corporation.

ORDER

(To be filled in and signed by prospective purchaser)

I/We the undersigned hereby offer to purchase 11,000 cwt. of fresh Irish potatoes, Government Point of Purchase or Storage, \$.10 cwt. in the State of Washington—sacked (strike out phrase not applicable) and war-

rant that the potatoes will be used only for feeding livestock.

Name of Purchaser and Consignee: C. F. Williamson.
Date: Aug. 19, 1948. Address: Sunnyside, Washington.

Destination: Sunnyside.

Delivering Carrier: Truck.

Delivery Schedule (date and quantity): 50 ton a day.

I/We agree to take delivery at USDA point of purchase and I/We will do our own hauling.

I/We have read the terms and conditions of this sale as set forth herein and in Form 111, "Terms and Conditions for Sale of Fresh Irish Potatoes for Livestock Feed" and agree fully to abide by such terms and conditions.

/s/ C. F. WILLIAMSON
Signature of Purchaser.

RECEIPT

Receipt is hereby acknowledged of the above order and payment in the amount of \$1,100.00 covered by No. 9 4729 and No. 9 4874 Aug. 19 and Sept. 22, 1948.
Date: September 22, 1948.

/s/ JOHN CHINN,

Purchase Representative.

The Form 111 (Pl. Ex. 5, R 310), referred to in the last paragraph of the "Order" above set forth, reads as follows:

Form FV-111

United States Department of Agriculture
Production and Marketing Administration
Fruit and Vegetable Branch, Washington, D. C.

TERMS AND CONDITIONS FOR SALE OF FRESH IRISH POTATOES FOR LIVESTOCK FEED

Use: Purchaser agrees to use the potatoes delivered pursuant to his order for the sole purpose of feeding such potatoes to livestock. Title to the potatoes shall not pass to the purchaser until the potatoes delivered are actually fed to livestock or processed into feed for livestock.

Failure or Delay in Deliveries: The United States Department of Agriculture and the Commodity Credit Corporation are hereinafter referred to as USDA. USDA does not guarantee the delivery to purchaser under the order of any specified quantity of potatoes at any specified rate or time, and there shall be no liability on the part of USDA for any failure or delay in filling the order, except that USDA shall refund to the purchaser the price paid with respect to any quantity of potatoes not delivered within a reasonable time after the scheduled delivery date.

Quality and Mode of Delivery: The potatoes to be delivered pursuant to this order are expected to be loaded in bulk. However, USDA reserves the right at its option, to make delivery in bags. At the discretion of USDA the potatoes may be stained by the use of a vegetable coloring which will not affect their use or fitness for stock feed. Quantities shipping by common carrier will be loaded in accordance with applicable regulations governing the use of cars for shipment of potatoes for the purpose for which they were sold. Cars will be loaded with not less than the applicable minimum carload weight. USDA gives no warranty as to

grade, quality or condition of any potatoes to be delivered except that no lot shall have more than 2 per cent soft rot when inspected at government point of purchase. The purchaser shall assume all risk as to grade, quality or condition after such inspection. If sale is made f.o.b. government shipping point, freight charges will be paid by the purchaser. If sale is made f.o.b. destination, freight charges will be paid by USDA.

Over and Under Delivery: Purchaser hereby agrees to pay USDA for any overage in delivery not to exceed 10 per cent of a particular carload or truckload and such payment shall be made within 15 days of receipt of invoices. USDA agrees to refund to the purchaser any amount due because of under-delivery. Determination of weights as established by USDA shall be final.

Determination of Weights: The weight of the potatoes delivered shall be established at the option of USDA on the basis of (a) USDA's purchase weight certificate or (b) cubic measurement as certified by the County Agricultural Conservation Committee, or (c) truck scale weights or (d) number of containers delivered multiplied by net weight per container as determined by USDA.

Records: Representative of USDA shall at any reasonable time have access to purchaser's premises, and other facilities in order to determine that the potatoes were, or are being used in accordance with the terms and conditions of the contract.

Compliance: It is understood that USDA would not deliver potatoes pursuant to this order if the purchaser did not warrant that they would be used only for feeding livestock. Since failure on the part of the purchaser to use the potatoes solely for feeding livestock will cause serious and substantial damage to USDA and since it will be difficult to establish the exact amount of such damage, purchaser agrees if the potatoes are

utilized in any form for human food or for any other purpose except for feeding livestock, to pay USDA in addition to any other charges that may be due USDA with respect to the potatoes, as compensation and not as penalty, liquidated damages at the rate of \$4.00 per cwt. or fraction thereof, with respect to any quantity of the potatoes used for human food at the rate of \$1.00 per cwt. with respect to any quantity used for purposes other than human food and livestock feeding. If potatoes are used for purposes other than feeding livestock, it shall be presumed that they have been used for human food, and the burden of proving that they have been used for some other purpose shall be on the purchaser. This provision shall not exclude any other form of relief to USDA, at law or in equity, including relief by injunction, in case the purchaser breaches this contract.

Officials Not to Benefit: No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of the contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to the contract if made with a corporation for its general benefit and shall not extend to any benefits that may accrue from the contract to a Member of or Delegate to Congress or a Resident Commissioner in his capacity as a farmer. (41 U.S.C. §22, 18 U.S.C. §204-8).

The said Form FV-111 was never shown to Williamson, his attention was not directed to said form, and no copy thereof was furnished to him. Neither was any reference made to that form by any representative of the United States Department of Agriculture or the Commodity Credit Corporation at any time when he arranged to purchase the potatoes he bought, on August 19, 1948. (R 28, 79-80).

Upon execution of the "Order" and the payment to the purchase representative of \$1,000.00, an informal certificate was issued to Williamson by the purchase representative, certifying "that C. F. Williamson has made a contract with our office for 500 tons of potatoes for livestock feed." (Def. Ex. 14, R 327). The said certificate was issued for presentation to potato dealers such as H. H. Simmons & Sons at Sunnyside, Washington, who honored the same by permitting the party named therein or his agent to obtain possession of potatoes then in the dealer's possession subject to the order of the Commodity Credit Corporation. (R 48-79).

The sixteen tons of potatoes which the appellant is charged to have stolen were potatoes which Williamson had purchased pursuant to the above procedure from the Commodity Credit Corporation for \$2.00 per ton, and which had been delivered by the Government to Williamson or his agent. (Pl. Ex. 4-11, R 77).

The appellant was not himself a potato grower, though he was interested in his brother-in-law's potato crop. (R 190-201). Williamson had endeavored to persuade the appellant to feed some of Williamson's potatoes to appellant's livestock, but appellant had been afraid that his cattle would be injured by that kind of feed. (R 180-189). Appellant had authority to feed any quantity of Williamson's potatoes he desired to appellant's livestock. (R 180-1, 193).

On Sunday, August 22, 1948, Williamson requested the appellant to help him in hauling Williamson's potatoes from the Simmons Warehouse in Sunnyside, Washington, to the Williamson home ranch pasture near the appellant's farm, where other potatoes (culls) had already been dumped, there empty the potatoes onto the ground for Williamson's cattle, and return the sacks to Simmons. The hauling operations were desired to commence on Monday morning, August 23, 1948, and appellant agreed to provide a truck and driver to assist his friend. Though appellant did not know it, the potatoes to be hauled by him were some which had been purchased by Williamson from the Commodity Credit Corporation. (R 83, 190-193).

As arranged, on the morning of August 23, 1948, one Adamson, a regular driver for the Herrett Trucking Company, drove a flatbed semi-trailer owned by the company to the Simmons Warehouse and loaded the same with potatoes, designated by the Simmons representative as "Williamson potatoes." This driver did not have time during that work day to complete hauling the potatoes to the Williamson ranch, and at about 6:00 o'clock P. M. he parked the truckload of potatoes in an open lot adjoining the Herrett Trucking Company office. (R 193-8).

On that same Monday evening of August 23, 1948, at about 8:00 o'clock P. M., Williamson called the appellant and informed him that one of his, Williamson's, farm trucks

was then loaded with potatoes at the Simmons Warehouse and that he, appellant, could have those potatoes to feed *appellant's* livestock if he would take the truck and unload the same so that the truck and the sacks in which the potatoes were placed would be available to Williamson for Tuesday (August 24, 1948) morning operations. (R 198).

At about 11:00 o'clock P. M. on that same Monday evening, the appellant personally went to the Simmons Warehouse, drove the Williamson farm truck to his, appellant's, farm and with assistance of others fully unloaded the potatoes thereon into appellant's cattle pasture. (R 198-200). No complaint is made by the Government of this procedure or this disposition of potatoes.

Before the appellant unloaded the Williamson potatoes into appellant's cattle pasture, he had no knowledge or information that the potatoes which were being dumped out on the ground for livestock were U. S. No. 1 potatoes. He had assumed that the potatoes that were being fed to livestock were culls or rejects. (R 201).

Appellant was interested in some potatoes being grown on a farm called Hathaway Farms, which was operated by his brother-in-law, and he knew that the potatoes which his brother-in-law was producing were very small and inferior ones so far as the commercial market was concerned. Appellant first checked the situation at the Williamson

pasture to make sure that Williamson had a large quantity of potatoes already lying on the ground. He then decided to take a portion of the potatoes on the Herrett truck and divert them into commercial channels, replenishing the supply for Williamson out of the Hathaway potatoes which were available to him. By doing that, the appellant foresaw that he would at least save the difference in the sorting costs. (R 202).

He anticipated that Williamson would make no objection to that procedure because he had seen large quantities of cull potatoes being delivered by Williamson for his cattle, and he had personally checked to determine that Williamson had a large quantity of potatoes then in his pasture with "cows milling over them, lying in them, standing on them." (R 202).

Appellant then took approximately 100 empty grain sacks from his ranch. With his brother and other personnel he caused the loaded Herrett truck and an empty van truck to be driven to the Williamson home ranch pasture. All the potatoes were dumped onto Williamson's pasture ground except approximately 100 sacks which were emptied into the Waller sacks and loaded into the Herrett Trucking Company van truck. Both trucks were then returned to the Herrett Trucking Company lot. Large lights were set up for this truck operation and there was no attempt at concealment of what was occurring. (R 88, 98). Commer-

cial trucking operations are carried on without regard to regular or daylight hours of work at this time of the year, which is a very busy one. (R 253-4).

The next morning, on Tuesday, August 24, 1948, a driver of the Herrett Trucking Company took the company's flatbed truck to the Majonnier Warehouse in Sunnyside, Washington, loaded it with Williamson potatoes and drove it to the open lot adjoining the Herrett Trucking Company, where it was parked. Thereafter, at about 2:00 o'clock P. M. of the same day and pursuant to the appellant's instructions, other employees of the company transferred approximately 220 sacks of the Williamson potatoes to grain sacks supplied by the appellant and loaded them into the van truck, completing the load. The balance of the potatoes on the semi-trailer truck were driven to the Williamson pasture and dumped on the pasture ground. (R 204). *All these operations were performed openly and with no attempt at concealment or the prevention of surveillance.* (R 238, 241).

The loaded van remained on the open lot of the Herrett Trucking Company until later in the evening on the same day when two of the employees of the company, pursuant to appellant's instructions, drove the truck to Portland, Oregon, where they met one Homer Waller, a brother of the appellant, on the next morning, Wednesday, August 25, 1948. (R 238).

Homer Waller had driven to Portland on other business on the afternoon of August 24, 1948, and the next morning, before meeting the truck, had tentatively arranged to sell the potatoes for appellant to one Joseph Caruso, a produce dealer. (R 204-5, 129).

After inspecting the potatoes Caruso agreed to purchase them for \$2.10 per cwt., which was the fair, reasonable price of the potatoes at the time he purchased them. In payment, Caruso gave Homer Waller a check in the sum of \$678.30, payable to Hathaway Farms. Caruso having observed that the potatoes were not marked, tags were made out and attached to each sack, each tag having written upon it "U. S. No. 1, Hathaway F. Granger, Wn." (R 131-3).

Hathaway Farms had approximately 50 acres of potatoes planted for the 1948 crop season. (R 192).

The check which Caruso gave to Homer Waller was given to appellant and cashed by him. (R 215).

The transaction was a personal one as to the appellant and was not one entered into on behalf of the Herrett Trucking Company. The drivers who operated the trucks were paid personally by the appellant in cash and the gasoline used by them was charged to the appellant. (R 216-7). The entire transaction was one which was entered into by the appellant through his close personal relation-

ship with Williamson, whom he believed to be the owner of the potatoes in question. *The appellant did not learn of the procedure with regard to purchasing potatoes, nor of any claim made by the Government to own them after they had been sold and delivered for stock feed, until after the date upon which the offense charged was allegedly committed.* (R 164-5, 206, 257-8).

The District Court admitted in evidence testimony to the effect that on Wednesday, August 25, 1948, *two days after the offense charged was allegedly committed*, the appellant contracted with the Commodity Credit Corporation for the purchase of 149 tons of potatoes for livestock feed. (Pl. Ex. 12, R 162, 325). Appellant's brother, Ed Waller, actually arranged the purchase for appellant, and in doing so was required to execute for appellant a contract similar to that which Williamson had signed when he had purchased potatoes for livestock feed on August 19, 1948. (R 256). This evidence was irrelevant, and its erroneous admission was prejudicial to the appellant.

SPECIFICATION OF ERRORS

The District Court erred:

1. In denying the appellant's motions for judgment of acquittal, for the reason that there was no substantial evidence that the potatoes taken by the appellant were owned

by the Commodity Credit Corporation at the time they were taken.

2. In denying the appellant's motions for judgment of acquittal, for the reason that there was no substantial evidence that appellant took the potatoes in question *with intent to steal* them from the Commodity Credit Corporation, or from anyone.

3. In denying the appellant's motion for a new trial upon the ground of an erroneous admission of Plaintiff's Exhibit No. 12 in evidence, to the prejudice of the appellant. (R 4-5, 162). Plaintiff's Exhibit No. 12 was the contract for the purchase of potatoes for livestock feed which was entered into by the appellant on August 25, 1948. (Pl. Ex. 12, R 325-7). The objection to this evidence is set forth as follows:

"Mr. Robinson: Your Honor, these are—I object to them as entirely irrelevant. The dates shown are August 25th; its a purchase form, the same one Mr. Williamson signed, and I think it's Exhibit 4, the purchase dates are August 25 and September 23, 1948, indicating, I think, rather clearly—

The Court: Subsequent to the date of the indictment?

Mr. Robinson: Yes, two days after for one of them, and a month after for the other, and the guilty knowledge must have been shown, if they can show it at all, certainly at the time that any taking was involved, and by their own statement the potatoes were in Portland before this ever occurred." (R 46, 144-9, 162).

ARGUMENT OF THE CASE

I. SUMMARY OF ARGUMENT

The principal contentions of the appellant may be briefly summarized as follows:

A. There is no substantial evidence that the potatoes diverted by the appellant were "owned" by the Commodity Credit Corporation at the time they were taken. The reservation of a bare legal title by the Commodity Credit Corporation did not make it the "owner" at the time of the taking by the appellant, *after* the potatoes had been sold and delivered to Williamson, and paid for by him.

1. The Statute and Its Interpretation.
2. Federal Cases Dealing with the Interpretation of the Word "Owned."
3. A Trustee with Bare Legal Title is not an "Owner."
4. Conversely, the Person holding the Beneficial Interest is considered to be the Owner of the Property.
5. The Word "Own" refers to a Complete Property Ownership.
6. The Reservation of Title in a Conditional Seller does not make Him the "Owner."
 - a. Taxation cases.
 - b. Automobile liability cases.
 - c. Annexation case.
 - d. Charitable exemptions case.
 - e. Forfeiture of vehicles under liquor laws.
 - f. Insurance cases.
 - g. Lien statute cases.
 - h. Miscellaneous cases.

7. The Charterer of a Vessel may be considered the "Owner."
8. The "Possessor" is frequently considered to be the "Owner."
9. Other cases.
10. Summary of Evidence Regarding Sale.

B. There was not substantial evidence that the appellant intended to *steal* the property which he took, or commit any other penal offense with regard to it. All the evidence showed that the appellant thought the property belonged to Williamson, and that Williamson was such a close personal friend that it was inconceivable for the appellant to have taken anything from him with intent to steal it.

C. The District Court erred, to the prejudice of the appellant, in admitting evidence that two days *after* the date of the alleged offense, the appellant entered into a contract with the Commodity Credit Corporation for the purchase of potatoes for livestock feed.

The principal factual issue of the case was whether the appellant intended to *steal* the potatoes which he took. This rested upon the Government's claim that the potatoes were owned by the Commodity Credit Corporation and appellant knew that to be the situation when he took the potatoes. Appellant denied any knowledge of the claimed ownership interests of the Commodity Credit Corporation

and set forth his belief that the potatoes belonged to his friend Williamson. Appellant's relationship with Williamson was such that if he believed the potatoes were Williamson's, whether they actually were or not, no intent to steal them could have been found by the jury.

The erroneous admission of the evidence in question prejudicially affected the appellant's case because the jury apparently confused the activities of Williamson in buying the potatoes from the Commodity Credit Corporation *before* the date of their taking, with the action of the appellant in arranging a contract for the purchase of potatoes *after* he had discovered the quality of the potatoes and had diverted them. The improperly admitted evidence was probably used by the jury as a basis for concluding that appellant knew the technical wording of the sales contract signed by Williamson a week before.

II. THE COMMODITY CREDIT CORPORATION DID NOT OWN THE PROPERTY TAKEN.

At the time of the taking involved, the Commodity Credit Corporation did not own the potatoes which are the subject of this action. By its contract with Williamson, and the acts which followed before the potatoes were taken by appellant, the Corporation had lost possession and the right to possession to the potatoes. It had delivered the potatoes and the right to possession of them to Williamson,

who was entitled to them. It had received full payment under its contract. The contract contained a covenant that the potatoes would be used for livestock feed, but the Corporation reserved no right of repossession, rescission or forfeiture of the contract and return of the property in the event the covenant was breached. On the contrary, the corporation covenanted with Williamson for the complete disappearance of the potatoes and for a civil penalty. (Pl. Ex. 4, 5, R 308-313). The Commodity Credit Corporation was deprived by appellant of none of the attributes which are associated with ownership. He neither deprived it of possession, value, or use, since it neither had nor was entitled to any of them at the time the appellant took the potatoes.

The appellant contends that since the Commodity Credit Corporation had sold the potatoes to Williamson, and had vested him with all attributes of ownership except the bare legal title, the Corporation did not *own* the property at the time it was taken.

1. The Statute and Its Interpretation.

15 U.S.C.A. § 714m(c) (Sec. 15(c), Public Law 806, Laws of the 80th Congress) under which this indictment was brought, provides as follows:

“(c) Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or that of another

property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than \$10,000.00 or by imprisonment for not more than five years, or both."

The appellant is charged with stealing, removing, or converting to his own use property "owned" by the Commodity Credit Corporation. No other portion of the penal provision of the statute is relevant.

It should be noted that the statute does *not* punish the taking of "property of which the *legal title* is held by the Commodity Credit Corporation," nor does it punish the taking of "property sold on a conditional sales contract by the Commodity Credit Corporation."

It is axiomatic that penal statutes are to be construed strictly against the Government. 14 *Am. Jur., Criminal Law, Sec. 19*, page 774. 14 *Am. Jur., Criminal Law, Sec. 20*, Page 776.

From the above authorities it is apparent that statutes creating crimes cannot be extended by intendment, and that such statutes must be construed favorably to the liberty of the citizen.

This point is clearly set forth in the case of *U. S. vs. Ninety-Nine Diamonds*, 8 Cir., 139 F. 961, 964, in which the Court stated as follows:

"But a penal statute which creates and denounces a new offense should be strictly construed. A man ought

not to be punished unless he falls plainly within the class of persons specified by such a statute. An act, which is not clearly an offense by the express will of the Legislative Department of the Government, must not be made so after its commission by the interpolation of expressions or by the expunging of some of its terms by the judiciary. The definition of offenses and the classification of offenders are legislative, and not judicial, functions; and where, as in the case at bar, a penal statute is plain and unambiguous in its terms, the Courts may not lawfully extend it to a class of persons who are excluded from its effect by its words, because, in their opinion, the acts of the latter are as mischievous as those of the class whose deeds the statute denounces. It is the intention expressed in the statute and that alone to which the Courts may give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate, and then enact or expunge provisions to accomplish those supposed intentions."

The Congress could have provided specifically, with regard to any such taking as occurred in this case, that it would be a crime to steal from such a purchaser as was Williamson. Federal statutes have made a Federal offense the taking of property from a railroad car, a station house, or a steamboat, which is moving as an inter-state shipment. And it should be noted that in the statute applicable here the Congress specifically covered situations in which property was *held by* or *mortgaged* or *pledged* to the Commodity Credit Corporation. This indicates that of those classes of situations in which less than complete ownership was involved, only those *specifically* set forth were intended by the Congress to be proscribed by the statute.

It is also significant that no Federal administrative regulation embodies the language of the so-called Form 111 (Pl. Ex. 5; R 310-313) or provides for the retention of title or ownership in the Government in accordance with the provisions of that form.

2. *Federal Cases Dealing with the Interpretation of the Word "Owned."*

In a large number of cases, the Courts have construed the meaning of the word "owned," holding that *the retention of title did not make the party retaining it the owner*. First will be taken up the cases which arose in the Federal Courts. These deal with many different factual situations which will be referred to briefly.

In *Baltimore Dry Dock and Shipbuilding Corporation vs. New York & T. R. S. S. Company*, 4 Cir., 262 F. 485, the Court had occasion to determine the meaning of the words "owned by." It stated that those words meant "an absolute and unqualified title."

Couture vs. United States, 8 Cir., 256 F. 525, 526, involved an indictment under a statute providing punishment for "stealing property of the United States." The charging portion of the indictment stated that the horse was

"Then and there the property of the United States of America and held in trust for an Indian known as Edward Takes-the-Shield, of the Standing Rock Indian Reservation; the then Edward Takes-the-Shield being

then and there an Indian under the charge of a superintendent of an Indian Reservation."

In reversing a judgment of conviction, upon the ground that the property stolen "was not the property of the United States," the Court stated in part as follows:

"The Trial Court had jurisdiction to punish the stealing of property of the United States, but it had no general common law jurisdiction to punish the stealing of the property of anyone within its territorial jurisdiction. Before a man could be punished, his case must be plainly and unmistakably within the statute. (Citing case). An offense which may be the violation of a criminal procedure is an act committed or omitted in violation of a public law either forbidding or commanding it. (Citing case). There are no common law offenses against the United States. (Citing cases). It must be conceded, we think, that the property stolen from the possession of Takes-the-Shield was not the property of the United States within the meaning of Section 47 of the Penal Code."

In three different related cases dealing with this subject, the United States Supreme Court, a Circuit Court for California, and a District Court for California held that the word "owner" referred to a person holding more than just the bare legal title.

One Hyde was charged with the violation of the Federal Land Settlement Law. A Federal statute provided for the exchange by an "owner" of property of the land owned by him, for other property which he could obtain from the Government. Hyde and his associates obtained *legal title*

to tracts of land and endeavored to exchange them for other properties, contending that as the holder of the legal title he was the "owner" of the lands he was endeavoring to exchange, under the wording of the statute.

In *Hyde vs. Shine*, 199 U. S. 62, 82, 50 L. Ed., 90, 96, 25 S. Ct. 760, the Court said that

"Although the word 'owner' has a variety of meanings, and may, under certain circumstances, include an equitable as well as a legal ownership, or even a right of present use and possession, it implies something more than a bare legal title, and we know of no authority for saying that a person in possession of land under a void deed can be regarded as the owner thereof."

In *Ex Parte Hyde*, (C. C. Cal.) 194 F. 207, 215, the Court stated,

"The conspiracy in this case is charged to be the claim of ownership of land by the accused, the title to which they had obtained fraudulently from the State, leaving the equitable title in the State, and the exchange of a legal title alone for which the Government had a perfect title and would convey, in exchange, a perfect and indefeasible title. 'Ownership' means the possession of the full and complete title. The books are full of decisions to that effect."

In *U. S. v. Hyde* (D. C. Cal.) 132 F. 545, 548, the Court stated that the word "owner" means the person with both legal and equitable title—the owner of a perfect and complete title. The Court also held that the owners of a "bare legal title" were not "owners" of the property.

A case involving an interpretation of an Internal Revenue Bureau regulation with the force and effect of law was *City Bank Farmers Trust Company vs. Hoey*, 2 Cir., 125 F 2d 577, 579. The regulation in question provided a transfer tax on a merger in which stock "owned by" the corporation was taxed. The case involved a situation in which the taxpayer corporations transferred stock as to which they had only the *legal title*. The question was whether such stocks were "owned by" the corporations and the transfers therefore taxable. The Court stated,

"We agree with appellee that 'owned' means 'beneficially owned' and that this case does not fall within the provisions, since here the stocks were not 'owned' beneficially by the merging bank."

This case was followed by the case of *State Street Trust Company vs. Hassett*, (D. C. Mass.) 45 F. Supp. 671, 675, in which the Court stated that the word "owned" meant "beneficially owned."

Note also the cases of *Welch vs. Davidson*, 1 Cir., 102 F. 100, 102, and *Rheinstrom vs. Commissioner of Internal Revenue*, 8 Cir., 105 F. 2d 642, 646, in which the courts confirmed that in equity the beneficiary of a trust is the "owner" of the property which is the subject of the trust.

In re Stitt, 6 Cir., 252 F. 1 was a bankruptcy case. The statute in question providing for exemptions stated that they would not be granted to one who was "the owner of

the homestead." A bankrupt with title to a homestead, which did not sell for enough to pay the mortgages against it, was held not "the owner of a homestead" and therefore entitled to an allowance of exemptions from personalty, the Court holding in essence that the person with the bare legal title only to homestead property was not the owner of it.

American Basket Co. vs. Farmville Insurance Co., (C. C. Va.) 1 Fed. Cases 618. The plaintiff's policy of fire insurance with the defendant required that the assured should be "the entire, unqualified, and sole owners for their own use and benefit." The plaintiff had bought property in the State of Delaware and paid for it in full and was in possession of it, but it did not hold legal title to the property because of a law of the State of Delaware prohibiting foreign corporations from owning real estate in Delaware. The Court held that since the beneficial title remained in the insured, the fact that the naked legal title was outstanding in another person did not prevent recovery upon the fire insurance policy.

For a similar holding that the conditional vendee of property could recover as "sole owner" under such a policy of fire insurance, see *Smith vs. Jim Dandy Markets, Inc.*, 9 Cir. 172 F. 2d 616.

In *Central Vermont Transportation Co. vs. Durning*, 294 U. S. 33, 37, 79 L. Ed. 741, 745, 55 S. Ct. 306, the Court

considered the Federal maritime statute which required vessels operating in the United States coastwise trade to be "owned" by United States citizens. The corporation owning the vessel in question was a Maine corporation which was in turn owned by a Vermont corporation, and the stock of the latter was owned by a Canadian citizen. Under this state of facts, the Court found that the Maine corporation was not "owned" by a United States citizen under the words of the statute.

Slater Trust Co. vs. Randolph-Macon Coal Company, (C. C. N.Y.) 166 F. 171, involved a covenant in a mortgage of real estate that the mortgagor was the "owner." The Court construed this word to require absolute ownership in fee simple, with all the rights and interests belonging to the property.

The case of *Midland Oil Company vs. Thigpen*, 8 Cir., 4 F. 2d 85, 91, involved the defendant's liability to third persons by reason of the actions of a lessee under a lease from the Government. The Court stated that "a tenant or occupant of premises having the entire control thereof is, so far as third persons are concerned, the owner."

Under tariff statutes with reference to liability for duties on goods imported, the consignee has been held the "owner and importer," as respects the liability for duties. *U. S. vs. Bishop*, 8 Cir., 125 F. 181; *Blumenthal Print Works vs. United States*, (D. C. La.) 51 F. Supp. 208.

To the effect that more than a mere legal title must have been held by the Commodity Credit Corporation, for the conviction in this case to be sustained, is 2 Cyclopedia of Criminal Law, 1923 Edition, Sec. 751, Page 1246. "Usually larceny may be committed by stealing from any ownership whatsoever, regardless of the kind. *But to sustain a prosecution under the Federal statutes for stealing property of the United States, it must be alleged and proved that the articles taken were in fact the property of the United States.*" (Citing *Thompson vs. United States*, 2 Cir., 256 F. 616, cert. den. 249 U. S. 617, 63 L. Ed. 804, 39 S. Ct. 391).

In another case the indictment charged theft of property of the United States, but the proof showed theft of property of the Defense Plant Corporation, the stock of which was owned by the United States. The conviction was reversed upon appeal by the Court of Appeals. *Cartwright vs. United States*, 5 Cir., 146 F. 2d 133.

Two additional cases hold that the seller of a boat who retained the bare legal title as security for payment of the purchase price was not the "owner" within a statute respecting the limitation of liability. *American Car & Foundry Company vs. Brassert*, 7 Cir., 61 F. 2d 162, 164; *Munson Steamship Line vs. Commissioner of Internal Revenue*, 2 Cir., 77 F. 2d 849, 850.

3. *A Trustee with Bare Legal Title is not an "Owner."*

The position of the Commodity Credit Corporation in this case, as the holder of the bare legal title, may be likened to that of a trustee who has legal title but no beneficial interest. The authorities hold that such a trustee is not an "owner."

The American Law Institute's Restatement of the Law of Trusts states as follows:

"Sec. 2. (d) Title and Ownership. The term 'owner' is used in the Restatement of this Subject to indicate a person in whom one or more interests are vested for his own benefit. The person in whom the interests are vested has 'title' to the interests whether he holds them for his own benefit or for the benefit of another. Thus the term 'title' unlike 'ownership,' is a colorless word; to say without more that a person has title to certain property does not indicate whether he holds such property for his own benefit or as trustee."

The cases of *McIntyre vs. Easton and A. R. Co.*, 26 N. J. Equity 425, and *Farmers Loan and Trust Company vs. Essex*, (Kan.) 71 Pac. 269, 270, hold that the word "trustee" is opposite of the word "owner" and that a trustee has legal title but no beneficial interest; a mere naked trustee is therefore held not to be an "owner."

In *Engineering Society vs. Detroit*, (Mich.) 14 N. W. 2d, 79, 83, a trustee had naked legal title, but the property was held to be "owned" by the beneficiary of the trust.

A recent case holding that the beneficial owner of property is the owner rather than the holder of the mere legal

title is *President, etc. of Middlebury College vs. Town of Hancock*, (Vt.) 55 A. 2d 194, 197. Likewise, in *Trustees of Iowa College vs. Baillie*, (Iowa) 17 N. W. 2d 143, 146, the court stated:

“Was the real estate ‘owned’ by Grinnell College as a part of its endowment fund, within the meaning of the exemption statute? The word ‘owned’ as used in said statute means equitable or beneficial ownership rather than legal title.”

A case holding that a lessee under a ninety-nine year lease which was renewable forever was the “owner,” as distinguished from a trustee with legal title to the property, is that of the *Welfare Federation vs. Glander*, (Ohio) 64 N. E. 2d 813, 823.

4. *Conversely, the Person Holding the Beneficial Interest is Considered to be the Owner of the Property.*

In *Sommers vs. City of Wauwatosa*, (Wis.) 23 N. W. 2d 485, the Court held that the person who had the beneficial interest in a tax sale certificate for county land was the “owner” of the certificate.

A Massachusetts statute exempted from taxation property which was owned by a charitable corporation. Taxing authorities attempted to tax the property of which the legal title was in a non-charitable corporation, with the beneficial interest held by a charity. The Court concluded that the case fell within the statutory exemption

as the property was "owned" by the holder of the beneficial interest. *Assessors vs. Trustees* (Mass.) 6 N. E. 2d 363.

The case of *Martin vs. State Insurance Company*, 44 N. J. Law, 485, involved a condition in an insurance policy by which the policy insured the "owner." The Court held that an individual who held the equitable ownership of the property was "owner," and protected by the policy of fire insurance, though the bare legal title was held by another person.

Similarly, the case of *Watertown Fire Insurance Company vs. Simmons*, 96 Pa. 520, is one in which the Court holds that the insured is the "absolute owner" although a dry trust of legal title is in another person.

5. *The Word "Own" Refers to a Complete Property Ownership.*

The A. L. I. Restatement of Property discusses the term "ownership" as follows:

"Sec. 10 (b) Ownership of a thing. A person who has the totality of rights, powers, privileges, and immunities which constitute complete property in a thing (§ 5 Comment e) is the 'owner' of a 'thing,' or 'owns' the 'thing.' The word 'thing' is substituted in this connection for the term 'interest in the thing,' that is, the ownership is predicated of the physical objects and not of the interest. This usage is well established and is followed in this Restatement."

A number of cases enforce the conclusion that the

holder of a bare legal title cannot be considered the "owner."

The case of *Leigh vs. Green*, (Neb.) 6 N. W. 1093, 1096, holds that the word "owner" in the popular sense has the meaning "absolute owner."

A definition of the term "owner" appears in the case of *Miller-Link Lumber Co. vs. Stephenson*, (Texas) 265 S. W. 215, 220. In that case the Court states that the "owner" is "one who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy and to do with as he pleases, either to spoil or destroy it as far as the law permits, unless he is prevented by some agreement or covenant which restrains his rights."

Similarly, in *West vs. Washington C. & R. R. R.*, (Ore.) 19 Pac. 666, 672, the Court defines an owner as one "who has dominion over a thing which he may use as he pleases, except as restrained by law or by agreement."

The following cases hold that the word "owner," standing alone, signifies an *absolute owner*, as an owner in fee simple, and not a qualified or limited interest in the property:

Phillips vs. Hardenburg, (Mo.) 30 S. W. 891, 895.

Bowen vs. John, (Ill.) 66 N. E. 357, 358.

Hankinson vs. Riker, 30 N. Y. S. 1040, 1043.

McCarthy vs. Hansel, 4 Ohio Appeals 425.

Wright vs. Bennett, 4 Ill. 258, 259.

6. *The Reservation of Title in a Conditional Seller does not make him the "Owner."*

The cases dealing with this phase of the subject will be divided into several subheadings and classified accordingly.

a. *Taxation cases.*

The following cases deal with taxes which are assessed against the person who "owned" the property in question.

In *Landis Machinery Co. vs. Omaha Merchants Transfer Co.*, (Neb.) 6 N. W. 2d 380, 383, the Court stated as follows:

"The fact that the tax must be levied on the owner of property does not necessarily mean the holder of the title. In a conditional sale title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the use of the property to the complete exclusion of the seller, subject only to the seller's remedy in case of default, and both in a practical and a legal sense the buyer is the beneficial owner." (Citing cases).

In *Ken Realty vs. State*, (Ala.) 25 So. 2d 675, 166 A.L.R. 588, the plaintiff corporation was purchasing land from the United States under a conditional sales contract. The Court nevertheless held that the plaintiff purchaser was the "owner" and that it had the risk of loss or damage and

could sell or lease subject to the right of the Government to enforce its claim under the sales agreement.

To similar effect see the case of *Bowls vs. Oklahoma City*, (Okla.) 104 Pac. 902.

b. *Cases considering the liability of a purchaser under statutes involving the "owner" of an automobile will now be considered.*

In *Hansen vs. Kuhn*, (Iowa) 285 N. W. 249, 252, the Court held that the purchaser of a truck on a conditional sales contract was the "owner," stating that he became "*the beneficial owner, the equitable owner, the substantial owner, immediately upon the execution of the contract.*" The Court continued,

"Only the naked title remained in the seller, subject to being completely divested upon the receipt of the final deferred installment of the purchase price. Other than the matter of payment, such a sale transaction is in no way different from the absolute sale."

Similar holdings are found in the following cases:

Craddock vs. Bickelhaupt, (Iowa) 288 N. W. 109.

Hunt vs. Century Indemnity Company, (R. I.) 192 Atl. 799, 112 A.L.R. 902, 909.

Lennon vs. L. A. W. Acceptance Corporation, (R. I.) 138 Atl. 215, 216.

c. *Under an annexation statute the conditional sales purchaser is considered the "owner."* In the case of

Phoenix vs. State, (Ariz.) 137 Pac. 2d 783, 146 A.L.R. 1255, such a purchaser of real estate under a land contract was the "owner" and authorized to sign a petition to annex property to the city.

d. *The conditional sales vendee is the "owner" under tax exemption statutes.*

The cases of *Village of Hibbing vs. Commissioner of Taxation*, (Minn.) 14 N. W. 2d 923, and *Ritchie vs. City of Green Bay*, (Wis.) 254 N. W. 113, 95 A.L.R. 1081, held that the purchaser of property under a conditional sales contract was the owner under a taxing statute exempting property owned by charitable organizations. *The Hibbing* case also held that the grantee of property under a deed containing a condition subsequent for return of the property to the grantor if the condition was breached was nevertheless the "owner."

e. *Cases regarding the forfeiture of vehicles used in violation of liquor laws.*

The following cases hold that a purchaser under a conditional sales contract is the "owner" of a motor vehicle purchased by him, under the interpretation of statutes providing that such a vehicle can be forfeited if used by the purchaser in the violation of liquor laws. This conclusion is arrived at, regardless of the retention of legal title by another party.

State vs. One Pontiac Coach Automobile, (S. D.) 224 N. W. 176.

Weston Chevrolet Co. vs. Zehntfennig, (S. D.) 229 N. W. 307, 308.

Commonwealth vs. Bowers, (Pa.) 155 Atl. 605, 607.

In the Bowers case, the Court stated as follows:

“He (the seller) is not regarded as the owner in the common acceptance and understanding of the word. On the contrary, the buyer is regarded as the “owner” subject to the right of the seller to repossess himself of the vehicle for default, and if a car should be stolen from the buyer and used without his knowledge in the illegal transportation of intoxicating liquors, I have no doubt of his right to make claim for the vehicle as an innocent ‘owner’ within the provisions of the Act.”

f. *Insurance cases.*

An insurance policy required the assured to be the “unconditional and sole owner” in order to recover against the company. In *Kurowski vs. Retail Hardware Mutual Indemnity Insurance Company*, (Wis.) 234 N. W. 900, the Court held that a purchaser under a conditional sales contract who was in possession held the equitable title and was such an “unconditional and sole owner” and “owner in fee simple.”

A similar holding is found in *Dunning vs. Firemen’s Insurance Company, etc.*, (S. Car.) 8 S. E. 318, 320.

g. *The conditional purchaser is the owner in lien statute cases.*

The following cases deal with statutory and other provisions for garagemen's or mechanics' liens. They hold that the purchaser of property under a conditional sales contract is the "owner" and "owns" the property for the purpose of the attachment of the lien:

Universal Credit Co. vs. Marks, (Md.) 163 Atl. 810.

Friedenbloom vs. Pecos Valley Lumber Company, (N. Mex.) 290 Pac. 797.

Knapp vs. Baldwin, (Iowa) 238 N. W. 542, 544.

Kerfoot vs. Sayles, (Okl.) 293 Pac. 1033.

Clark vs. Ingram, (Ala.) 160 So. 229, 230.

Ridgeway vs. Broadway, (S. C.) 75 S. E. 132.

Holstein Lumber Co. vs. Hansen, (Iowa) 201 N. W. 46.

Randolph vs. Christenson, (Ore.) 265 Pac. 797, 799.

Johnson vs. Soliday, (N. D.) 126 N. W. 99, 100.

Loomie vs. Hogan, 9 N. Y., 435, 61 Am. Dec. 706.

h. *Miscellaneous cases hold that the conditional sales purchaser is an "owner."*

In *Mesich vs. Board of County Commissioners*, (N. Mex.) 129 Pac. 2d 974, 976, the Court held that the purchaser of land under an executory contract of sale was an "owner" and that the seller held the legal title as a naked trust for the purchaser. Likewise in *Downey vs. Bay Street Railway Company*, (Mass.) 114 N. E. 207, the conditional sales vendee, rather than the person holding the legal title, was held to be the "owner."

A Tennessee statute gave a pedestrian injured by an automobile a lien against the automobile if at the time of the injury the vehicle was being operated by the "owner." In *Parker-Harris vs. Tate*, (Tenn.) 188 S. W. 54, the purchaser of such an automobile under a conditional sales contract was held to be the "owner."

Similarly, in the following cases the purchaser under a contract of sale, and not the individual holding the legal title to the property, was held by the Court to be the "owner":

In Re Farley, 153 N. Y. S. 271, 275 (regarding consent of owners of neighboring dwellings).

Garnett vs. Buss, (Kans.) 155 Pac. 2, 3, L.R.A. 1916 F, 1289 (action for damages to property).

Knapp vs. Ellyson Realty Co., (Ind.) 5 N. E. 2d 973 (right of possession after mortgage foreclosure).

Bone vs. Gowan, (Texas) 84 S. W. 385, 386 (right to buy contiguous state land).

Spellman Land & Securities Co. vs. Standard Investment Co., (Mo.) 238 S. W. 418, 422 (involving a redemption from a tax sale, and the Court states that the "owner of an equitable title" is the "owner in the general acceptance of the term").

Friemann vs. Cummings, (Wis.) 200 N. W. 662 (vendor held not liable for defects in a building as "the owner" of the building).

7. *The Charterer of a Vessel may be considered the "Owner."*

In the case of *American Barge Line Co. vs. Jones &*

Laughlin Steel Corporation, (Tenn.) 163 S. W. 2d 502, 503, the Court holds that a charterer of a vessel to whom is transferred the command and possession and consequent control over its navigation is considered to be the "owner" for the voyage or service stipulated. Similar holdings have been announced in *Potter vs. American Union Line*, 185 N.Y.S. 842, 843, and *Herm vs. Williamson*, (Ohio) 25 N. E. 1.

8. *The "Possessor" is frequently considered to be the "Owner."*

In the case of *Thomas vs. Blair*, (La.) 35 So. 811, 813, the Court stated:

"There is no substantial difference between the meaning of the words "possess" and "own." They are equivalent in common speech, and according to all the lexicographers."

Likewise, under statutes making the "owner" of a dog liable for injuries to persons bitten by the dog, the Court in the following two cases held that the person who had the dog in his possession and harbored it on his premises was the "owner" of the dog under the wording of the statutes:

Schulz vs. Griffith, (Iowa) 72 N. W. 445.

Hornbein vs. Blanchard, (Colo.) 35 Pac. 187.

9. *Other Cases.*

Other relevant cases not included in the above classifi-

cations, contain similar holdings. They show that the ordinary meaning of the term "owned" does not refer to one holding only a bare legal title after the property in question has been sold to another. They reveal that the holder of the beneficial interest is normally considered to be the "owner."

The case of *Elliott vs. Elliott*, (Kans.) 114 Pac. 2d 823, is a good example. This case involved a Kansas statute providing that property which was "owned" by a woman before marriage should remain her property in the event of divorce. The plaintiff wife had record title to the property in question and contended that this fact brought her within the statute. However, the Court distinguished "title" from "ownership." It pointed out that one could have title even if a trustee for another person, but that ownership involved the beneficial interest in the property. The plaintiff was held not to "own" the property, despite her record title.

In the case of *In Re Brigham's Estate*, (Iowa) 290 N. W. 11, the Court held that "the term 'owner' when used alone imports an absolute owner or one who has complete dominion of the property owned, as the owner in fee of real property." The case involves the question of what property had been "owned" by the decedent at the time of his death.

The case of *J. J. Anderson Lumber Company vs. Spears*,

(S. D.) 127 N. W. 643 holds that a person who has paid the consideration for the property is the "owner" of it within the terminology of a mechanics' lien statute, though the legal title to the property is held by another person.

The Court's attention is also invited to the case of *Ramsey vs. Leeper*, (Okl.) 31 Pac. 2d 852, 861. An Oklahoma statute authorized a municipality to condemn land in order to "own" it. Construing the meaning of the word "own" as used in the statute, the Court said it meant an unqualified vesting of title, and that the word standing alone and unqualified by reference to a lesser interest, meant a complete ownership of the property.

Note also the case of *McFieters vs. Pierson* (Colo.) 24 Pac. 1076, 22 Am. St. Rep. 388, which involves the "ownership" of a mining claim. The Court held that such ownership was established when the location was made and the locator had possession in compliance with the laws for acquiring title. Similarly, in the case of *State vs. Savidge*, 93 Wash. 676, 161 Pac. 471, the Court held that the claimant of a mining claim was the "owner," despite the fact that the legal title to the property was in the State.

10. *Summary of Evidence Regarding Sale.*

Unquestionably, the transaction between the Government and Williamson was a *sale* of potatoes by the Commodity Credit Corporation to Williamson. The agreements

(Pl. Ex. 4 and 5 (R 308-313) use the terminology of sale throughout and describe such individuals as Williamson as the “purchaser.” Those documents refer to the *delivery* and method of *taking delivery*.

Furthermore, the evidence of the *Government* witnesses, and particularly the testimony of John Chinn with regard to the transaction, refer to the sale of the potatoes to Williamson and the purchase of them by him. (R 25-56). Williamson took delivery of the potatoes, and his receipts showing transfer of possession of the potatoes to him were introduced in evidence by the Government as Plaintiff’s Exhibits 10 and 11. (R 323, 324).

Not only did the Commodity Credit Corporation sell these potatoes to Williamson, receive payment for them, and deliver them to him, but they contracted with him for the complete disappearance of the potatoes and further covenanted with him for the payment of a civil penalty. The Commodity Credit Corporation reserved no re-possession, rescission or forfeiture rights with regard to the contract for the sale of the potatoes, or for the return of any of the property. That Corporation was deprived by the appellant of neither possession, value, or use of the property. How, then, can it be contended that he stole property belonging to it?

Had the Congress intended that Section 714m (c) of Title 15 U.S.C. apply to this situation, it could easily have

used precise language. It could have forbidden the taking of property of which the legal title was held by the Commodity Credit Corporation, or property which had been sold by the Commodity Credit Corporation on executory or conditional sales contracts. The Congress did not include such language, but used the words "owned or held by, or mortgaged or pledged to, the corporation," thus indicating its clear intention to punish as a felony the acts specifically referred to and them only. The ordinary and common meaning of the words used must prevail, particularly in a case involving one charged with the commission of a crime. The wording of the statute must be construed most favorably to the appellant, and the meaning adopted which has been placed upon the term "owned" by the many cases above cited.

The Commodity Credit Corporation undoubtedly has owned or held, or has had mortgaged or pledged to it, large amounts of property, just as other Government agencies have at times owned property. The statute in question here should be construed to fit the common and ordinary situations which it was intended to cover. When such circumstances are not presented by the evidence, the statute may not be unnaturally warped in an effort to cover a situation which is not within its plain meaning, nor in the understanding of the Congress which adopted it.

There being no proof that the property taken by the

appellant was "owned" by the Commodity Credit Corporation when it was taken by him, it having been sold by that agency and delivered to Williamson, the motions for judgment of acquittal which were presented to the District Court should have been granted.

III. THE APPELLANT HAD NO CRIMINAL INTENT TO STEAL THE POTATOES IN QUESTION.

The appellant's motions for judgment of acquittal should have been granted because there was lacking substantial evidence that the appellant intended to steal the property which he took, or to commit any other offense with regard to it. All evidence in the case indicated that the appellant believed the potatoes in question belonged to Williamson. It is not controverted that at the time of the taking, and at all times to and including the trial, Williamson was an extremely close friend and neighbor of the appellant, so much so that they used all of each other's property and equipment in a most informal manner. Furthermore, Williamson *gave* to the appellant an *entire truckload of potatoes* on the same day that appellant diverted the potatoes which he later sold. (R 180-1, 187-8). From this uncontroverted evidence, it is overwhelmingly clear that the appellant entertained no criminal intent in the diverting of the property which he thought was Williamson's.

To sustain the conviction in this case, the appellant court must be able to find that the evidence is more consistent with the guilt than with the innocence of the appellant. *Williams vs. United States* (Ct. App. D. C.) 140 F. 2d 351.

Further, it is pointed out in the case of *Hammond vs. United States*, (Ct. App. D. C.) 127 F. 2d 752, that unless there is substantial evidence of facts which exclude any other hypothesis but that of guilt, it is the trial court's duty to instruct the jury to return a verdict for the accused. In that decision the Court held that where all the substantial evidence is as consistent with innocence as guilt, the appellant court should reverse the judgment which was entered against the accused by the District Court.

Here, the evidence is just as consistent with the innocence of the appellant as it is with his guilt, even if the Court finds that the Commodity Credit Corporation owned the potatoes in question at the time they were diverted.

From the commencing of the first loading of the potatoes, until the last statement was given to the Government investigators, there was no effort at concealment or the avoidance of surveillance, by the appellant. It is true that some of the activities about which testimony was given occurred in the night-time, but the uncontroverted evidence and testimony with regard to the trucking operations of

the appellant, which are active commercial trucking operations in a busy agricultural community during the harvest time, was to the effect that all such trucking activities are on a *twenty-four hour basis and without regard to any regular daytime or daylight shifts*. (R 238, 341-2).

Such work as was done by the appellant in handling the diverted potatoes at night, was done with all the light available, and was of course readily observed by Government witnesses. (R 88).

It must be apparent that had the appellant desired to steal any property which he knew was *Government* property, he would certainly not have followed the open and apparent course of procedure which he took, and which, without any concealment on their part, was observed by many witnesses. A large part of the actions taken occurred on a main street of Sunnyside, Washington, in broad daylight on a summer afternoon.

On the other hand, if the appellant had intended to steal potatoes from his friend Williamson, which the Government has not contended, he certainly would not have done so in Williamson's own home pasture and close to his place of residence.

Many persons assisted the appellant in the loading and transportation of the potatoes in question to market. Most of them were called as witnesses at the trial to testify. They went into detail with regard to the handling of the

potatoes, and were unanimous in the evidence that at no time was any action taken which indicated a criminal intent on the part of the appellant. (R 235, 238, 241-2).

The appellant had every reason to believe that the potatoes he was handling were owned by Williamson and that he had at least the implied, if not the express consent of Williamson to do with them as he wished. Whether the potatoes were "owned" by Williamson, or by the Commodity Credit Corporation, the appellant certainly believed that they belonged to Williamson. (R 206). He had every reason to believe that, and substantial evidence of his intent to steal the potatoes is lacking in the record in this case.

IV. PREJUDICIAL EVIDENCE WAS ERRONEOUSLY ADMITTED BY THE DISTRICT COURT.

The appellant's motion for a new trial should have been granted because the District Court erred, to appellant's prejudice, in admitting evidence that two days *after* the date of the alleged offense, the appellant entered into a contract with the Commodity Credit Corporation for the purchase of potatoes for livestock feed.

The evidence in question was in the form of the sales contract and the Form 111 which was referred to in it. The contract was executed by a brother of the appellant for the appellant, on *August 25, 1948*. (Pl. Ex. 12, R 46, 144-9, 162, 255-8, 325-7). The District Court permitted the

first offer of the exhibit to be withdrawn, but left the contract and Form 111 in identification for later presentation and ruling. (R 46, 144-9, 162).

The indictment charged the appellant with taking potatoes on Monday, August 23, 1948. The evidence showed that that date was the one upon which the diversion of the potatoes was commenced, although some final action was taken with regard to them on the next day. The diversion of the potatoes was entirely completed before any action was taken by the appellant with regard to the contract which is Plaintiff's Exhibit No. 12, and the action taken to purchase potatoes for livestock feed, after the diversion of the potatoes by the appellant had been completed, was entirely irrelevant to any issue in this case.

The appellant had about forty head of cattle, and had had an adequate period of time in which to observe the effect of feeding potatoes to them. (R 186, 200). Thereafter, he determined to purchase some additional potatoes for his livestock, but his action in that regard is totally disconnected from any element of the crime charged in the indictment (R 190). It is clear that the evidence of such other action is inadmissible because it was not connected with the offense charged in point of time, nor did it reveal anything with regard to the intent of the appellant. *Moyer vs. United States* (Ct. App. D. C.) 132 F. 2d 12.

The situation in this case is similar to that in which

evidence of *other offenses* committed by the defendant has been introduced, other than for the purpose of impeaching the defendant as a witness. It seems to be clearly established that in such cases the evidence of other offenses should be excluded, unless there is a direct tendency on the part of the evidence to prove the particular crime charged or some element of it. *Kempe vs. United States*, 8 Cir., 151 F. 2d 680, 687. *Eley vs. United States*, 6 Cir., 117 F. 2d 526, 528. *Martin vs. United States*, (Ct. App. D. C.) 127 F. 2d 865.

In the case of *Witters vs. United States*, (Ct. App. D. C.) 106 F. 2d 837, 840, 125 A.L.R. 1031, 1035, the Court had to consider the question of whether the lower court had properly admitted evidence of an offense which occurred subsequent to the offense charged. The Court stated:

"The opinion of the Court is that upon the question of knowledge the cases, properly interpreted, make evidence of other offenses admissible only when it relates to *prior offenses* or to situations in which the offenses occurred *both prior and subsequent* to the offense charged in the indictment, and that, consequently, the admission of evidence of *subsequent* offenses for the purpose of showing knowledge was fatally prejudicial and necessitates a reversal of the judgment."

The evidence in question was not only improperly admitted, but the error of the District Court was prejudicial to the appellant.

Once the District Court had determined that the potatoes in question were "owned" by the Commodity Credit Corporation, after they had been sold and delivered to Williamson, the principal factual issue of the case was whether the appellant intended to steal the potatoes which he took. This rested upon the Government's claim that the potatoes were owned by the Commodity Credit Corporation and that the appellant *knew* such to be the case when he took the potatoes. Appellant denied any knowledge of the claimed ownership interest of the Commodity Credit Corporation and set forth his belief that the potatoes belonged to his friend Williamson. (R 206). His relationship with Williamson was such that if he believed the potatoes were Williamson's, whether they actually were or not, no intent to steal them could have been found by the jury. The evidence which was erroneously admitted apparently caused the jury to confuse the activities of Williamson in buying the potatoes from the Commodity Credit Corporation *before* the date of their taking by the appellant, with the action of the appellant in arranging a contract for the purchase of potatoes *after* he had discovered the quality of the potatoes which Williamson had given to him for his livestock. The improperly admitted evidence was apparently used by the jury as a basis for concluding that appellant knew the technical wording of the sales contract

which had been signed by *Williamson* a week before, and which *appellant* did not see until a month later. (R 191).

In case of doubt, the Court should hold that the erroneous admission of the evidence was prejudicial to the rights of the *appellant*. As pointed out in the cases of *Keliher vs. United States*, 1 Cir., 193 F. 8, 20, and *Nicola vs. United States*, 3 Cir., 72 F. 2d 780, a new trial should be awarded for the improper admission of evidence, *unless it appears beyond doubt that such evidence did not and could not have prejudiced the rights of the party duly objecting.*

And when the admission of improper evidence was prejudicial to the accused, he was held to be entitled to a new trial in the cases of *U. S. vs. Dressler*, 7 Cir., 112 F. 2d 972, and *U. S. vs. Campanaro*, (D. C. Pa.) 63 F. Supp. 811, 815.

Where, as in the instant case, it appears that evidence admitted over objection was irrelevant to all elements of the offense charged, and that it was prejudicial to the *appellant*, the error committed necessitates the granting of a new trial.

In conclusion, the judgment of conviction and sentence

which was entered by the District Court should be reversed.

Respectfully submitted,

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MELVIN E. WALLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12232

*On Appeal from the District Court of the United States
for the Eastern District of Washington*

BRIEF FOR THE APPELLEE

HARVEY ERICKSON,
United States Attorney

FRANK R. FREEMAN
Assistant United States Attorney



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*On Appeal from the District Court of the United States
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BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

The Circuit Court has jurisdiction in the instant case under the provisions of Title 28, Sec. 1291, USCA, and the prosecution in the lower court was based upon Title 15, Sec. 714, USCA.

ARGUMENT

1. Answer to appellant's first specification of error, viz., that the District Court erred in denying the appellant's motions for judgment of ac-

quittal, for the reason that there was no substantial evidence that the potatoes taken by the appellant were owned by the Commodity Credit Corporation at the time they were taken.

This specification of error deals with whether or not potatoes purchased by the Commodity Credit Corporation to relieve an agricultural surplus and sold for livestock feed were owned by the Commodity Credit Corporation at the time of purchase. It is conceded by the appellant that, if the Commodity Credit Corporation purchased and paid for potatoes and took delivery of them, the Commodity Credit Corporation would then own the potatoes. The contention that the appellant makes is that the Commodity Credit Corporation was powerless and impotent to reserve title to potatoes which it sold for livestock feed until the potatoes were actually fed to livestock. Persons purchasing potatoes from the Commodity Credit Corporation signed a contract with the Commodity Credit Corporation giving them the right to purchase No. 1 potatoes for 10c per cwt. for livestock feed. The purchase agreement is set forth as Plaintiff's Exhibit 4 (R. 308) and is supplemented by Plaintiff's Exhibit 5. (R. 310). The following condition is important:

"Use: Purchaser agrees to use the potatoes delivered pursuant to his order for the sole purpose of feeding such potatoes to livestock. Title to the potatoes shall not pass to the purchaser until the potatoes delivered are actually fed to livestock or processed into feed for livestock."

The purchaser who purchased potatoes signed Plaintiff's Exhibit 4, the Purchase Order, which referred to Plaintiff's Exhibit 5 by reference. The purchaser certi-

fied that he had read Plaintiff's Exhibit 5 and agreed to abide by its terms and conditions. Appellant contends that the reservation of title provision in Plaintiff's Exhibit 5 is illegal and that when the purchaser purchased potatoes for 10c per cwt., he obtained an unqualified right to possession of those potatoes and could do anything he wanted with them as far as the criminal statute, Title 15, Sec. 714(m)(c), was concerned, which provides in part as follows:

"Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished * * *"

The trial court, in passing upon this question, stated as follows:

"In construing the language of this statute I think the Court should regard not only the immediate section here, its language, but also the whole Act of which it is a part; the act which sets up and provides for the activities of the Commodity Credit Corporation provides for the dealing with the problem of agricultural surplus. I think that can be done even in the case of a criminal or penal statute, although they are under the well known rules strictly construed.

"In the first place this statute obviously is not the conventional larceny statute, although it is headed larceny and conversion of property, and it contemplates punishment or interference with the corporation's interest in property, which is obviously much less than the whole ownership as ordinarily contemplated. It provides that whoever shall willfully conceal, remove, dispose of any (189) property owned or held by or mortgaged or pledged to the corporation—while that is not involved here, I think the Court can take into consideration that

in a proper case the penalty provision of this section could be applied to property merely held by the corporation in which it had no other interest except possession; it could be applied to property mortgaged to the corporation; it could be applied to property pledged to the corporation, and with reference to the ownership, I think that we might have a very different situation here if we had the conventional sale and purchase transaction where there was a provision such as is present here of a reservation of title in the seller, but here again I think we have to regard the whole program and its purpose and effect.

“It appears from the evidence here that in this instance the Commodity Credit Corporation, which is an agency of the government acting under the Department of Agriculture of course was buying these potatoes in order to hold up the price, and they bought them at the pegged price of two dollars and something a sack, a hundredweight, and then they turned around, and regardless of the terms of this transaction which is evidenced by exhibit 4, they call it a sale, but who would say that turning potatoes back to the grower at 10 cents a hundredweight, in the sacks, is a sales transaction in the ordinary construction (190) of the term? I think the Court can take judicial notice that new sacks cost more than 10 cents, and regardless of what it may be called, it is in the interest of the whole program, they’re permitting a nominal buyer to take this government property and use it for one purpose only, that is, to feed livestock.

“The government could have if they had wanted to, dumped them, burned them, destroyed them, but they thought it was in the public interest to use them as feed, but I think looking at this logically by its four corners, it may be regarded as permission of the government to Mr. Williamson to use these potatoes for the purpose of feeding his livestock, and they remained government property until he had used them for that purpose, and this

language of Form 111, the title shall not pass, there isn't a reservation of title; it's a provision that it shall not pass until the potatoes are delivered or fed to the livestock, and where they're turned over at the nominal sum of 10 cents a hundredweight, these No. 1 U. S. potatoes, worth on the market over \$2.00 a sack, and they're turned over at 10 cents a hundredweight, I don't think you can call this or regard it as a conventional transaction of sale and purchase to which the authorities cited by counsel would properly apply, and I think under those circumstances that it might well be said the government continued (191) to own these potatoes within the meaning of the controlling section here until they were used for the purpose for which they were delivered to Mr. Williamson.

"The government wasn't selling potatoes for 10 cents a sack; it was letting somebody use them at that nominal figure for a purpose which was in line with the government's agricultural program." (R. 176-179).

A sale is nothing other than a contract. Sec. 20 of the Uniform Sales Act, Sec. 5836-20 of Rem. Rev. Stat. of the State of Washington, provides as follows:

"Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer."

The case of *Borman v. United States*, 262 Fed. 26 (CCA 2), is a case analagous to the present case. In that case a conviction was sustained for stealing gov-

ernment property and conspiracy to do the same for clothing upon which the United States had reserved title. The court rejected the contention that title passed out of the United States to the contractor at the time of delivery and purchase. The court in that case cited from *Hatch v. Oil Co.*, 100 U. S. 124, stating that the general rule was said to be that the agreement as to the passing of title is just what the parties intended to make it, if the intent can be collected from the language employed, the subject matter, and the attendant circumstances.

The case of *United States v. Haugen*, 58 Fed. Supp. 436, at page 438, was a case involving the use of fraudulent meal tickets against the Olympic Commissary Company, an agent of the United States. The United States relied upon the title provision in the contract for the purchase of foods which provided that title remained in the United States, although the property was in the possession of the Olympic Commissary Company, which was a restaurant supply house. In this opinion Judge Schwellenbach stated:

“The one exception was proof in the form of invoices for food which contained a stipulation that title passed to the United States upon delivery to the Olympic Commissary Company. If this defendant were charged with stealing food belonging to the Government, this invoice evidence would be sufficient.”

In the *Haugen* case the language in the purchase forms gave the United States title to the food when purchased. In the case at issue, the language used in the sales order certainly reserved title in the United States until the potatoes were used for livestock feed.

In several recent cases decided during the war, particularly cases involving the Office of Price Administration, title to rationing coupons, books and documents had remained property of the Office of Price Administration while possession of the coupons, books and documents have been entrusted to other people. This is particularly true of gasoline ration coupons and a conviction of larceny for unlawful possession of gasoline coupons has been sustained when the coupons were obtained contrary to regulation. The regulation prescribed by the Administrator of the Office of Price Administration, being Sec. 1394.8104(a) of Ration Order 5C, 8 Fed. Reg. 16423, provided as follows:

“All coupon books, bulk coupons, inventory coupons, other evidences . . . are, and when issued shall remain, the property of the Office of Price Administration. The Office of Price Administration may refuse to issue, and may suspend, cancel, revoke, or recall any ration and may require the surrender and return of any coupon book, bulk coupon, inventory coupons or other evidences . . . during suspension or pursuant to revocation or cancellation, whenever it deems it to be in the public interest to do so.”

The Supreme Court, in the case of *Davis v. United State*, 328 U. S. 528, at page 588, stated:

“The coupons remained the property of the Office of Price Administration and were at all times subject to recall by it.”

The case of *Lotto v. United States*, 157 F. (2d) 623 (CCA 8), is a case involving larceny of gasoline ration coupons. The contention the appellants made in that case is similar to the contention appellant makes in

this case, that the ration coupons never did constitute Government property, but the court held that under administrative regulations the coupons remained the property of the Office of Price Administration.

The contention was also made that the provisions of the Second War Powers Act, making gasoline rationing coupons Government property, constituted an unconstitutional delegation of legislative powers. Again that question was resolved against the appellants. Although gasoline rationing coupons had long passed out of the Government's hands into the hands of a third party, still they remained Government property to the extent that a charge of larceny of Government property could be based upon the theft of coupons from private individuals.

In this case there can be no dispute but that the Commodity Credit Corporation owned the potatoes when it bought them from the growers. The appellant contends that the reservation of title in the potatoes by the Commodity Credit Corporation was illegal, that it could not hold title to the potatoes for any purpose after it sold them, but certainly Congress, which created the Commodity Credit Corporation for the purpose of dealing with agricultural surpluses, was given the right to provide for the control and distribution of those surpluses. Any other interpretation would not be in accord with recent decisions of the courts in regard to protecting a lawful function of the Government against depredations of wrongdoers.

It is a matter of common knowledge that the Commodity Credit Corporation purchased millions of tons

of No. 1 potatoes, to withdraw them from the market, at a price in excess of \$2.00 per cwt., in order that the growers might obtain a fair profit on their crops of potatoes. If the Commodity Credit Corporation was impotent to prevent the use of these potatoes for human consumption, no purpose would be subserved by their buying the potatoes as they would be back upon the market a second time either for sale to the Commodity Credit Corporation again or to some other purchaser. Indeed the same load of potatoes might be sold a number of times to the Commodity Credit Corporation and purchased for livestock feed and then if, as appellant contends, the purchaser has absolute title to them, he can sell them wherever he wants so that the whole potato price support program would break down. Certainly the Secretary of Agriculture and the agents of the Commodity Credit Corporation had that thought in mind when they provided that the potatoes could only be sold for livestock feed and that title to the potatoes would remain in the Commodity Credit Corporation until that purpose was subserved.

As has been pointed out, the question as to when title passes in the sale is a matter of contract. The purchaser and seller can determine that for themselves by written agreement. Certainly it is not against public policy for the purchaser and seller in any contract to provide in a written agreement for the passing of title at a specific time.

If the position taken by appellant is correct, once potatoes are sold by the Commodity Credit Corporation for livestock feed, the Commodity Credit Corporation

loses all control over them contrary to the written contract between the Commodity Credit Corporation and the purchaser. None of the cases cited by appellant under this specification of error touch upon facts similar to this where the parties have expressly contracted that title shall remain with the Commodity Credit Corporation, the vendor, until used for the specific purpose of livestock feed.

2. Answer to appellant's second specification of error, viz., that the District Court erred in denying the appellant's motions for judgment of acquittal, for the reason that there was no substantial evidence that appellant took the potatoes in question *with intent to steal* them from the Commodity Credit Corporation or from anyone.

It is submitted that this Court, in reviewing the record, at this time must take the view of the evidence which is the most favorable to the Government and accept as true all the facts which the evidence reasonably proved.

Taylor v. Mississippi, 319 U. S. 583;
Henderson v. United States, 143 F. (2d) 681;
Canella v. United States, 157 F. (2d) 470;
O'Leary v. United States, 160 F. (2d) 333;
McRae v. United States, 163 F. (2d) 868;
Nye & Nissen v. United States, 168 F. (2d) 846;
Pasadena Research Laboratories, Inc. v. United States, 169 F. (2d) 375, c. d. 335 U. S. 853;
Barcott v. United States, 169 F. (2d) 929.

The appellant admitted that on August 23, 1948, he was directed by one Charles F. Williamson, a potato grower, to haul stock feed potatoes from a packing shed to Williamson's stock feed lot south of Sunnyside, where potatoes were being fed to Williamson's cattle. The appellant admitted that his employees were shielding the potatoes with a tarpaulin against the hot summer sun as they were taken from the warehouse, which is not done with potatoes destined for animal food. The appellant admitted that he, personally, with his employees, proceeded to the Williamson feed lot at midnight on August 23, 1948, started to work by gasoline lantern until 3:00 a.m. on August 24, and that the potatoes were then transferred from branded potato sacks into plain sacks without any identification, then reloaded on a van truck and hauled back to Sunnyside. The appellant admitted that late that night at his direction a full truck load of potatoes, consisting of 323 sacks, was hauled to Portland. Later the 323 sacks were sold at \$2.10 per cwt., or a total of \$678.30. (R. 328).

The check for the potatoes was made out to Kenneth Hathaway, the appellant's brother-in-law, cashed by the appellant, and the proceeds went into the appellant's pocket. The appellant did not testify that Williamson, the grower and purchaser of these potatoes, ever gave him permission to take the potatoes to Portland. The specific directions of Williamson, to the contrary, were to take the potatoes to the feed lot and dump them for animal food. The appellant, although admitting the physical facts connected with the shipment of the stock feed potatoes from Sunnyside to

Portland, and the sale to a wholesale potato dealer, denied any intent to steal any property of the Commodity Credit Corporation or from Charles F. Williamson, the purchaser of the stock feed potatoes. The appellant attempted to show that he was such a close friend of Williamson that there would be no probability that he could commit a crime of larceny against Williamson. The facts as to his friendship with Williamson were submitted to the jury. The only question which the Court refused to let Williamson answer was the following question, which was a conclusion:

“Q. By reason of your friendship could Mel Waller possibly steal anything from you?

“A. No, sir.

“MR. ERICKSON: Object to that.

“THE COURT: Don't answer the questions until they're ruled on. I'll sustain an objection to that, and order that it be stricken from the record and the jury instructed to disregard it. That's a conclusion of the witness, and not proper.” (R. 181, 182).

The appellant was permitted to testify as to the nature of his friendship with Williamson and transactions back and forth.

The appellant knew that the potatoes were not his. He must have known that they were potatoes purchased under the Commodity Credit Corporation Act, because he was president of a trucking firm in Sunnyside which was one of the leading potato growing districts in the state of Washington, and his trucking firm was engaged to a large extent in the trucking of potatoes. Although perhaps he did not know of the intricacies of the price

support program and the title reservation policy of stock feed potatoes, the jury certainly had a right to find that he had reasonable knowledge that stock feed potatoes could not be sold for human consumption. Almost everyone knew of the 1948 potato price support program. Tremendous quantities of potatoes were purchased by the Government to remove the surplus from the market and keep the price at certain levels for the benefit of the potato growers. Certainly the jury had a right to resolve this fact against the appellant.

Even though the appellant did not know that the potatoes were Government potatoes or Commodity Credit Corporation potatoes until they were actually fed to the livestock, he did certainly know that the potatoes were not his. Williamson testified specifically that the potatoes were directed to be taken to his feed lot for stock feed, as indicated by the following question:

“Q. And what instructions did you give Melvin Waller about hauling those potatoes for stock food; what were your instructions to him?”

“A. I told him to haul them out to my cattle out the other side of Sunnyside.” (R. 74).

When Waller took the potatoes from the feed lot he violated his trust with Williamson. Whether he thought he was stealing Government potatoes or Commodity Credit Corporation potatoes or Williamson's potatoes is immaterial. A thief who steals property, knowing that it is not his, is nevertheless guilty of a Federal charge if the property turns out to be property of the United States. *Haugen v. United States*, 153 F. (2d) 850 (CCA 9).

The appellant's argument under this assignment of error was addressed to the jury. The jury rejected it. It is believed that it is improper for this court to consider it at this time.

3. Answer to appellant's third specification of error, viz., that the District Court erred in denying appellant's motion for a new trial upon the ground of an erroneous admission of plaintiff's exhibit No. 12 in evidence, to the prejudice of the appellant.

Plaintiff's Exhibit 12 was a contract dated August 25, 1948, whereby the appellant, Melvin Waller, purchased 410,000 pounds of fresh Irish potatoes to be delivered at 50 tons per day. (R. 325, 327). The date was August 25, 1948. Since the appellant denied he had any felonious intent when he sold the stock feed potatoes in Portland, Exhibit 12 was an important bit of evidence bearing upon his intent. All the other elements of the crime were admitted, except the appellant's intent. On the 25th day of August, 1948, the same day that the load was delivered in Portland and the check received for \$678.30 from Caruso for the first load of stock feed potatoes, the appellant signed another contract to buy 410,000 pounds of potatoes. If he sold the potatoes in this contract at the same figure as the other was sold, his gross profit in the operation would be \$8,200. This was a very important piece of evidence to show the intent of the appellant at the same time of the sale of the stock feed potatoes. Caruso's check for the stock feed potatoes was dated August 25, 1948. (Plaintiff's Exhibit No. 17, R. 329). If the deed is even committed prior or subsequent to the time charged, it is admissible, to show the state of mind or the intent

of the appellant. Here, the two transactions were on exactly the same date. The indictment charges that the theft occurred on August 23, but the evidence showed that it was a continuing offense beginning on the 23rd and ending on the 25th of August. Although appellant's contract on August 25, 1948, with the Commodity Credit Corporation is not another offense in itself, even if it were evidence of another similar offense, it is admissible to show intent. *Henderson v. United States*, 143 F. (2d) 681 (CCA 9); *Tedesco v. United States*, 118 F. (2d) 737 (CCA 9).

CONCLUSION

It is respectfully submitted that the judgment should be affirmed because the evidence in this case shows that the Commodity Credit Corporation retained title to the potatoes until they were actually fed to livestock or processed into feed for livestock. In addition, there was ample evidence on which the jury could base the finding of guilt.

Respectfully,

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of Appeals
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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FILED

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P. O'BRIEN,
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ARGUMENT OF THE CASE

I. REPLY TO APPELLEE'S ARGUMENT THAT THE COMMODITY CREDIT CORPORATION OWNED THE PROPERTY AT THE TIME IT WAS TAKEN.

Appellant's contentions are set forth in his opening brief. Appellant does not dispute the *original* ownership by the Commodity Credit Corporation of the potatoes which are the subject of this action. But by its contract with the purchaser, Williamson, and the acts which followed before the potatoes were taken by the appellant, the Commodity Credit Corporation was not the owner of the property at the time that it was taken. The Corporation had lost possession and the right to possession of the potatoes and had delivered the potatoes and the right to possession of them to Williamson, who was entitled to them. It had received full payment under its contract and reserved no right of repossession, rescission or forfeiture of the contract and return of the property in the event of the breach of any covenant in the agreement.

The Commodity Credit Corporation covenanted with the purchaser Williamson for a complete disappearance of the potatoes and for a civil penalty, and it was not deprived by the appellant of the attributes which are associated with ownership. He did not deprive the Commodity Credit Corporation of the possession, value, or use of the potatoes, since the Corporation neither had nor

was entitled to any of those rights at the time the appellant took the potatoes.

The contention of the appellant is that since the Commodity Credit Corporation had sold the potatoes to Williamson, and had vested him with all of the attributes of ownership except possibly the bare legal title, the Corporation did not *own* the property at the time it was taken, as the word "own" was used in the statute under which this indictment was brought.

The appellant does *not* contend, as appellee urges, that the Commodity Credit Corporation was "powerless and impotent" to reserve the title to potatoes which it sold for livestock feed, nor that any reservation of title provision is "illegal," as contended by appellee. On the contrary, the appellant urges that the *ownership* of the goods in question had not been reserved or retained by the Commodity Credit Corporation, and that it was not the *owner* of the potatoes at the time they were taken.

No part of the statute referring to the activities of the Commodity Credit Corporation refers to the sale by that agency of property for livestock feed. Nowhere in that statute is a reference made to the power of the Commodity Credit Corporation to sell property and vest the purchaser with all attributes of ownership except the bare legal title, nor is there any reference whatsoever to indicate that the Congress had in mind such a transaction

as the one which occurred here, at the time the statute was passed. The provision under which the appellant was indicted is headed "Larceny and Conversion of Property." It uses the conventional language of criminal statutes in prescribing the theft of property "owned" by the Commodity Credit Corporation. As a penal statute it should be strictly construed against the Government.

Undeniably, the Congress could have provided specifically, with regard to any such taking as occurred in this case, that it would be a crime to steal from such a purchaser as was Williamson. No such provision is contained in the statute, and its omission is significant.

The purpose of the Government agricultural surplus program was to dispose of surplus commodities which it had bought at a supported price. Whether it thereafter gave away or sold the potatoes, it was no longer the owner of them after the consummation of such a disposal transaction as occurred in this case.

Had the appellant taken the potatoes in question *before* they were sold, obviously the statute would have been applicable. That situation is the one intended to be covered by the statute, and the penal provision should not be warped into a construction unjustified either by its plain wording or by the authorities.

The cases cited by the appellee are clearly distinguish-

able from the situation in this case. The case of *Borman vs. United States*, 2 Cir., 262 F. 26, is one in which the Court found a bailment of Government property which the defendant had conspired to steal. Clearly, in that case the ownership of the property remained in the United States, and the identical property in question was to be returned, in manufactured form, to the Government for use by the Army, after its processing was completed.

United States vs. Haugen, D. C. Wash., 58 F. Supp. 438 and *Haugen vs. United States*, 9 Cir., 153 F. 2d 850 was a case in which the defendant was charged with defrauding the Government by issuing counterfeit meal tickets. The tickets purported to be meal tickets of a Commissary Company which was an agency of the Government. The only relevant issue at the trial and on the appeal was whether the Commissary Company was shown to be a Government agency, and the evidence on that question was held to be sufficient. The statement quoted by appellee from the opinion of the District Judge was clearly dictum.

The appellee relies heavily upon the cases involving the Office of Price Administration ration coupons. Those cases are not controlling. In the applicable regulations not only was the "property" stated to remain forever in the Office of Price Administration, but provision was also clearly made for the recalling of any ration coupon, and for the requiring of the surrender and return of any such

coupon and its revocation or cancellation. In the case of those regulations, there was no mere retention of bare legal title, such as has been held in the many cases cited by the appellant not to constitute *ownership*.

The appellee has made no effort to refer to the cases cited by the appellant in his opening brief, except to state that they do not "touch upon facts similar to this." The appellant urges that the opinions of some seventy courts, with regard to the meaning of the words "owned," and "ownership," may not be so lightly cast aside in a case in which the interpretation of those words is directly in issue. This Court should hold, as have those many decisions, that the reservation of the bare legal title does not reserve in the transferor the ownership of the thing in question.

II. REPLY TO APPELLEE'S ARGUMENT THAT THE APPELLANT INTENDED TO STEAL THE POTATOES IN QUESTION.

The appellant's motions for judgment of acquittal should have been granted because there was lacking substantial evidence that the appellant intended to steal the property which he took, or to commit any other offense with regard to it. He had every reason to believe that the potatoes he was handling were owned by his close friend and neighbor, Williamson, and that he had at least implied, if not the expressed consent of Williamson to do with them as he wished.

Williamson gave to the appellant an *entire truckload of potatoes* on the same day as that alleged in the indictment. The appellant knew nothing of the Commodity Credit Corporation, nor of any claims by it that it "owned" potatoes which it had sold and delivered to purchasers. It is entirely clear that the appellant entertained no criminal intent in the diverting of property which he thought was Williamson's.

Against this positive state of the record, the appellee sets such conclusions as the appellant "must have known that they were potatoes purchased under the Commodity Credit Corporation Act" and that "almost everyone knew of the 1948 potato price support program."

The criminal intent which must be found before a felony conviction can be sustained, should not be rested upon such vague conclusions, when set against positive evidence to the contrary. The evidence is uncontroverted that neither the appellant nor his trucking firm had any previous knowledge or experience with Commodity Credit Corporation or any product sold by it, or had ever previously handled any "surplus" potatoes.

The evidence in this case is just as consistent with the innocence of the appellant as it is with his guilt, and the appellant's motions for judgment of acquittal should have been granted.

III. REPLY TO APPELLEE'S ARGUMENT THAT PLAINTIFF'S EXHIBIT NO. 12 WAS PROPERLY ADMITTED IN EVIDENCE.

The appellant urges that his motion for a new trial should have been granted because the District Court erred, to appellant's prejudice, in admitting evidence that two days *after* the date of the alleged offense, the appellant entered into a contract with the Commodity Credit Corporation for the purchase of potatoes for livestock feed.

It is clear that the appellant did not actually execute any contract with the Commodity Credit Corporation, but that a contract was executed by one of appellant's brothers for him on August 25, 1948. At all times at the trial, the appellee contended that the appellant formed an intent to steal the potatoes in question on August 23, 1948, and the contract in question was entirely irrelevant to the issues made by the indictment and appellant's plea.

After the potatoes in question were diverted, they were sold to a dealer in Portland, Oregon, two days thereafter. Appellee would have the Court believe that the evidence as to the contract entered into by appellant, through his brother, with the Commodity Credit Corporation, had some connection with the sale of potatoes in Portland two hundred miles away. But the Government did not contend that appellant's intent was deduced from the sale of the potatoes in Portland; it urged at the trial that the intent

was derived from the appellant's actions on Monday, August 23, in Sunnyside, Washington, and at the Williamson farm on that date.

The situation is thus clear that the District Court admitted in evidence a document which was completely irrelevant because it was in no way connected with the offense charged. Neither in point of time nor otherwise did it reveal anything with regard to the intent of the appellant, and the admission of this improper evidence was highly prejudicial to the appellant.

The appellee has cited no authority for its apparent position that offenses occurring *subsequent* to those charged were properly admitted in evidence. The cases cited by it, *Henderson vs. United States*, 9 Cir., 143 F. 2d 681, and *Tedesco vs. United States*, 9 Cir., 118 F. 2d 737, relate to factual situations and circumstances occurring prior to that upon which the criminal charge was based. On the other hand, the case of *Witters vs. United States* (Ct. App. D. C.) 106 F. 2d 837, 125 A.L.R. 1031, is a clear and distinct holding that the admission of such evidence as was objected to by the appellant constitutes reversible error.

The commission of that error necessitates the granting of a new trial.

In conclusion, it is respectfully urged that the judgment

of conviction and sentence which was entered by the District Court be reversed.

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No. 12,233

IN THE
United States Court of Appeals
For the Ninth Circuit

HOMER C. PRICE,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

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IN THE
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Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", dismissing appellant's petition for writ of habeas corpus and discharging writ of habeas corpus. (T. 53-54.) At the time the action was brought the Court below had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453, now superseded by Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below dismissing the petition is now conferred upon this Honorable Court by Title 28 U.S.C.A., Section

2253, but prior to September 1, 1948 such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

Prior to the filing of the petition for writ of habeas corpus on which the order for the issuance of the writ was entered herein (T. 2), appellant, an inmate of the United States Penitentiary at Alcatraz, California, had filed three petitions in the District Court of the United States for the Northern District of California, all of which had been denied. The facts leading up to the issuance of the writ herein are found in the opinion of the Supreme Court of the United States in *Price v. Johnston*, 334 U.S. 266, and are likewise set forth in pages 73 through 79, inclusive, of the Transcript of Record (hereinafter referred to as "T.") in a statement by counsel for the appellee, the Warden of the said penitentiary, made during the hearing on the writ before the Court below, the correctness of which statement was not disputed by counsel for the appellant. Originally, as above indicated, our case at bar was entitled *Price v. Johnston*, but on the day the writ was issued it was changed to *Price v. Swope* to reflect the fact that during the pendency of the action James A. Johnston had retired as Warden of the penitentiary at Alcatraz, to be succeeded by E. B. Swope, the appellee herein. (T.1.) Appellant's original complaint was, in the instant case, that the Government had knowingly employed false testi-

mony before the trial Court to secure his conviction of the offenses of armed bank robbery and kidnapping, but at the inception of the hearing on the writ, at which time appellant was represented by counsel (T.1) he was permitted to amend his petition to include an allegation that the Government had knowingly deprived him of his right of appeal from the judgment of conviction heretofore entered against him. (T. 80 and T. 83.) During the hearing, evidence both oral and documentary was introduced, and appellant testified in his own behalf. Thereafter, written memoranda were filed by both parties, after which the matter was submitted. Thereupon, the Court below, after considering the cause, filed its order dismissing the petition for writ of habeas corpus and discharging the writ of habeas corpus (T. 53-54, and Appendix I to this brief), and made findings of fact and conclusions of law adverse to appellant. (T. 55-64, and Appendix II to this Brief.) From this latter order, appellant now appeals to this Honorable Court. (T. 68.)

CONTENTIONS OF APPELLANT.

The appellant, as above indicated, contends in substance that

- (1) the Government knowingly employed false testimony to secure his conviction;
- (2) the Government knowingly deprived him of his right of appeal from his judgment of conviction.

QUESTION.

Are the contentions of the appellant supported by the record?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

The appellee respectfully calls the attention of this Honorable Court to the undisputed finding of the Court below that the appellant "is a confirmed criminal, and prior to his sentence by the trial Court had a long record of previous felony convictions". (T. 105-106.) Thus the Court below could have disbelieved everything the appellant said and by relying solely on the presumption laid down by the Supreme Court of the United States in

Johnson v. Zerbst, 304 U.S. 458, 468, that when collaterally attacked, the judgment of the Court carries with it the presumption of regularity, could have also properly arrived at the conclusion, which it did, that the appellant was not denied due process of law. See also

Hall v. Johnston, 86 Fed. (2d) 820, 821, wherein this Honorable Court declared:

"* * * the trial Court had jurisdiction and as nothing appears upon the face of the record to indicate the contrary, the presumption will obtain that the defendant's rights were carefully guarded throughout the proceedings."

Bearing in mind this presumption, and bearing in mind also the familiar rule that the Court is the sole judge of the credibility of witnesses in a proceeding before it without a jury, and the equally familiar rule that its findings can not be set aside unless clearly erroneous,

Pers v. Hudspeth, 110 Fed. (2d) 812;

Macomber v. Hudspeth, 115 Fed. (2d) 114, 116;

Kelly v. Johnston (C.C.A. 9), 128 Fed. (2d) 793, 794;

Gimpelson v. Kaufman, et al. (C.C.A. 9), 167 Fed. (2d) 672, 675,

the appellee will now discuss the contentions of appellant in the order in which they are raised by him.

I.

THE ALLEGED KNOWING USE OF PERJURED TESTIMONY BY THE GOVERNMENT.

It is the contention of the appellant that a Mr. Fred E. Donner, cashier of the Metamora State Savings Bank of Meemora, Michigan, had committed perjury during his trial for armed bank robbery and kidnapping, and that the Government suborned such perjury. It is undisputed that when the witness first took the stand he testified that he had not seen a gun during the robbery of the bank, but when he resumed his place on the stand after an adjournment he then testified that he had seen a gun during the holdup. It is also undisputed that during the adjournment Mr. Donner had a conversation with the prosecuting at-

torney, John W. Babcock, and other officials, including an agent of the Federal Bureau of Investigation, Earl K. Richmond. From these facts appellant concludes that the Government officers who attended the conference had persuaded Mr. Donner to change his testimony, knowing that in so doing he was testifying falsely. Mr. Donner, in the habeas corpus proceeding on direct examination, denied this accusation when he testified as follows:

“Q. Did you, during the course of that trial, ever give any false testimony against Homer C. Price?

A. I did not.

Q. Did the agent of the Federal Bureau of Investigation, Mr. Richmond, ever ask you to testify falsely?

A. He did not.

Q. Did Mr. John Babcock, the Assistant United States Attorney, the Chief Assistant who prosecuted the case for the Government, did he ever ask you to testify falsely against Mr. Homer C. Price during that trial?

A. He did not.

Q. Did any Government official ever ask you to testify falsely against Homer C. Price during the course of this trial?

A. No, sir.” (T. 200.)

Mr. Babcock, who was also called as a witness on behalf of the appellee, denied that he had requested Mr. Donner, or any other witness, to testify falsely. On direct examination he testified:

“Q. Did you ever ask Fred T. Donner to testify falsely against Mr. Price?

A. No, sir.

Q. Did you ask anyone to testify falsely against Mr. Price during the trial?

A. No, sir.

Q. Do you know if any government official ever asked Mr. Donner to testify falsely against Mr. Price?

A. No, sir.

Q. Do you know if any government officials ever asked anyone to testify falsely against Mr. Price?

A. No, sir." (T. 162-163.)

On redirect examination, Mr. Babcock testified further along the same lines:

"Q. Mr. Babcock, yesterday I asked you if you had ever asked Mr. Donner or any other witness called by the Government to give perjured testimony. Now, let me ask you if while serving as a United States Attorney, did you ever put upon the stand upon the call of the Government any witness whose testimony you knew to be false and perjured?

A. No.

Q. Did you ever offer to introduce any testimony, by Fred T. Donner, or any other witness, in the United States v. Price and Siminov, knowing such testimony to be false, perjured, or untrue in any respect?

A. No, sir." (T. 187.)

For the record it should be noted that Mr. Babcock also testified during the habeas corpus hearing that he did not recall any conference and conversation with Mr. Donner during the adjournment period in ques-

tion, although Mr. Richmond, who was in charge of the investigation of this case, did clearly recall such conference and conversation, at which Mr. Babcock, the United States Attorney John Lehr, and himself were present. On direct examination Mr. Richmond, now no longer with the Federal Bureau of Investigation, stated, in pertinent part, as follows:

“Q. Can you tell us how that conversation happened to take place, if you know?

A. Yes, sir. During examination Mr. Donner was asked a question, this question——

Q. By whom?

A. I can not recall whether the question was asked on cross-examination or whether it was asked by Mr. Babcock.

Q. Go ahead, sir.

A. The question was, ‘Did you at any time see a gun in the possession of either of these defendants?’ Mr. Donner’s answer to that question was, ‘No.’ As a result of that question and answer, Mr. Babcock asked Mr. Donner to come to his office; the conversation in the office started in this way: Mr. Babcock said to Mr. Donner, ‘I am going to ask you a question and I want you to listen carefully. This is the same question—this same question was asked you on the stand: “Did you at any time see in the possession of these *of these* defendants a gun,”’ and Mr. Donner said, ‘Yes.’ Mr. Babcock then told him that he knew that he was hard of hearing and that he wanted him to listen carefully and to understand each question before he answered.

During the conversation—that ended most of it—well, ended the conversation concerning the question. Mr. Lehr, who was present, said to Mr.

Babcock, Tomorrow morning when we get back on the stand, or back in the trial, if he felt that the attorney for the defense was going to ask Mr. Donner if he was not conferring with us in your office this evening. Mr. Babcock replied that he didn't think that he would, that he would have nothing to gain by it. Whereupon Mr. Donner said, 'If he asks the question, what do I say?' Mr. Babcock said, 'Why, you tell the truth. You answer yes.' " (T. 138-140.)

"Q. Was anything said about Mr. Donner's hearing and the manner in which he should answer questions?

A. In the conversation in the room, Mr. Babcock made it clear to Mr. Donner that he should be certain of what the question was before he answered. Mr. Donner said in the conversation that he understood the question to be, 'Did you see the gun in the bank?' and that is why he answered it no. That is his statement, that he answered it no because he said he did not see the gun in the bank.

Q. Did Mr. Donner ever say where he had seen the gun?

A. He said that he saw the gun when they first stopped him on the street, sort of in the car, or as the gun was coming out of the car.

Q. And you say there was an admontion, not an admonition, but a statement to tell the truth.

A. Mr. Babcock told Mr. Donner to tell the truth.

Q. Was Mr. Donner cautioned about what he should say the next calling of the case?

A. The only cautioning done was when he asked the direct question, 'What shall I say if they ask me the direct question if I were in this office?' Mr. Babcock said, 'Why, you tell them the truth. Tell them yes.' '' (T. 140-141.)

During direct examination, Mr. Richmond also denied that he, or to his knowledge, any Government agent or official had ever asked Mr. Donner, or any witness, to testify falsely against the appellant. (T. 134-135.) It should also be noted that on cross-examination counsel for the appellant was able to derive very little comfort from the answers given him by Mr. Donner, Mr. Babcock and Mr. Richmond, answers substantially the same as given on direct examination.

To summarize—the explanation of Mr. Donner's change in testimony was extremely plausible in view of the fact that he was hard of hearing at the time he testified before the trial Court, a fact which the Court below, from its own observation, knew as a result of hearing Mr. Donner testify in the habeas corpus proceedings. Appellant, a convicted felon, obviously could not prevail, when to believe his uncorroborated accusation would mean that the Court below would have to disbelieve the testimony of Mr. Donner, Mr. Babcock and Mr. Richmond, which it did not do.

In view of the foregoing, it is apparent why the Court below found it to be a fact and also concluded as a matter of law that

“the Government, or any of its agents, did not knowingly, or at all, employ false testimony during the trial of the petitioner to obtain a conviction of the said petitioner”. (T. 58, 62; and Appendix II to this brief.)

II.

THE ALLEGED DEPRIVATION OF APPELLANT'S RIGHT OF APPEAL.

The appellant is quite vague in this allegation. He first testified before the Court below that he mailed a notice of appeal to the trial judge, the Honorable Edward F. Moinet (T. 113-114), but later, under cross-examination, he admitted that he had written the trial judge and informed him that he had sent the appeal papers to the clerk of the trial Court. (T. 114-115.) Appellant at one time filed a petition in the United States Court of Appeals for the Sixth Circuit for a writ of mandamus to require the trial judge to enter a decision on his application for an appeal. This petition was denied on the ground that “no application for appeal is pending before respondent or in the United States District Court for the Eastern District of Michigan”. (T. 158-159; *Price v. Moinet*, 116 Fed. (2d) 500; certiorari denied, 311 U.S. 703; rehearing denied, 311 U.S. 729.) In evidence, in our case at bar, is also the affidavit of the trial judge denying that an application for an appeal was before him. (Appellee’s Exhibit “B”, T. 85-87.)

Furthermore, the appellant was not a litigant who stood alone, but one who was represented by counsel

during all stages of the proceedings before the trial Court. As a matter of fact, the appellant's trial Court counsel filed a stipulation on his behalf on May 18, 1938 in a civil proceeding (T. 158), some four days after the judgment in the criminal case had been pronounced. Thus the appellant is not entitled to that degree of solicitude which might conceivably rest upon him were he completely without representation. As pointed out by Mr. Justice Rutledge in the case of *Boykin v. Huff*, 121 Fed. (2d) at page 980:

“Judicial objectivity may be served by keeping hands off when parties are adequately represented.”

This fundamental doctrine also finds support in the following cases:

De Maurez v. Swope (C.C.A. 9), 104 Fed. (2d) 758, 759;

Moore v. Aderhold, 108 Fed. (2d) 729, 732;

Errington v. Hudspeth, 110 Fed. (2d) 384, 386;

Lovvorn v. Johnston (C.C.A. 9), 118 Fed. (2d) 704, 707;

Osborne v. Johnston (C.C.A. 9), 120 Fed. (2d) 947, 949;

McDonald v. Hudspeth, 129 Fed. (2d) 196, 199.

Finally, Mr. Babcock testified that “so far as anything has been brought to my attention, there was no notice of appeal”. (T. 170.) Thus again, the appellant, as above indicated, a convicted felon, is certainly not entitled to be believed when he says, in the light of the overwhelming evidence against him, that the Gov-

ernment officials frustrated him in his attempt to take an appeal from his judgment of conviction. Accordingly, the Court below acted properly when it found both as a fact and as a conclusion of law that

“neither the trial judge nor the United States Attorney, nor any of his assistants, nor any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him in the trial court.” (T. 59, 62; and Appendix II to this brief.)

CONCLUSION.

In view of the foregoing which, in the main, constituted the arguments made by appellee in his memorandum filed in the Court below after the habeas corpus hearing had been concluded (T. 27-40), it is respectfully urged that the judgment of the Court below, amply supported by the evidence, is correct and should be affirmed.

Dated, San Francisco, California,

July 20, 1949.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)



Appendix.

the same time, the *Journal* has been able to publish a number of important studies.

It is true that the *Journal* has not been able to publish as many studies as it would like to. This is due to a number of factors. First, the *Journal* has a limited number of pages. Second, the *Journal* has a limited number of reviewers. Third, the *Journal* has a limited number of editors. Fourth, the *Journal* has a limited number of readers. Fifth, the *Journal* has a limited number of subscribers. Sixth, the *Journal* has a limited number of advertisers. Seventh, the *Journal* has a limited number of contributors. Eighth, the *Journal* has a limited number of topics. Ninth, the *Journal* has a limited number of languages. Tenth, the *Journal* has a limited number of countries.

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1. Smith, J. (1998). The Role of the United Nations in the Middle East. *Journal of International Law*, 10(2), 145-160.
2. Jones, A. (2001). The Impact of the Internet on International Relations. *Journal of International Law*, 13(1), 1-15.

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Appendix

I.

[Title of Court and Cause.]

“ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING WRIT OF HABEAS CORPUS.

The evidence adduced upon the hearing held after the issuance of the Writ herein does not support Petitioner's contentions that his constitutional rights were invaded. After a full consideration of all the evidence, both oral and documentary, I am satisfied that the Government or any of its agents did not knowingly, or at all, employ false testimony during the trial of the Petitioner in Criminal Cause No. 24629 in the United States District Court for the Eastern District of Michigan, to obtain the conviction of the said Petitioner. I am further satisfied that neither the trial judge nor the United States Attorney, nor any of his assistants, nor any of the representatives or agents of the Government, in any way prevented or frustrated the Petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him. I am further satisfied, from testimony developed at the hearing, that the Petitioner was ably represented by counsel at all stages of the proceedings before the trial court; that he was accorded his right of compulsory process of witnesses essential for his defense; that there was no conflict in interest between himself and his co-defendant; that he was accorded a fair trial; and that the

sentence which he is now serving is a valid judgment presently in full force and effect.

The Petition for Writ of Habeas Corpus is, therefore, **DISMISSED**; the Writ of Habeas Corpus is **DISCHARGED**; and the Petitioner is remanded to the custody of Respondent.

Respondent will present findings for signature.

Dated: February 16th, 1949.

Michael J. Roche,
United States District Judge.”

II.

[Title of Court and Cause.]

“FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled cause having been submitted by the parties hereto, Fredrik S. Waiss, Esq., appearing as counsel for the petitioner, and Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and Joseph Karesh, Assistant United States Attorney for the Northern District of California, appearing as counsel for respondent, and evidence both oral and documentary having been introduced and the petitioner having been heard in person under a writ of habeas corpus duly issued, and the Court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

I.

That petitioner is a citizen of the United States.

II.

That petitioner is detained by respondent E. B. Swope as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence of the District Court of the United States for the Eastern District of Michigan (hereinafter called the "trial Court"), in case number 24629, made and entered on May 14, 1938, and transfer order issued at Washington, D.C. on July 2, 1938, signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice ordering the transfer of petitioner from the United States Penitentiary at Leavenworth, Kansas, to the United States Penitentiary at Alcatraz Island, California.

III.

That on February 15, 1938, an indictment was returned to the Grand Jurors of the trial Court in said case number 24629 charging petitioner and a co-defendant, John Simunov, with violations of Sections 588b(a) (b) and 588c of title 12 USCA, that the indictment was in four counts: the first count charging the unlawful entry of a state bank insured by the Federal Deposit Insurance Corporation, with intent to commit a felony or larceny therein; the second count charging the robbing of such insured bank by taking

money from the presence of an employee thereof by force and violence and putting in fear such employee; the third count charging an assault and putting in jeopardy the life of such employee of such insured bank while robbing the same; and the fourth count charging that while committing the offenses alleged in the preceding counts and in avoiding apprehension, petitioner forced such employee to accompany him without the consent of such employee.

IV.

That petitioner was arraigned before the trial Court on the indictment in said cause number 24629 on February 18, 1938, at which time he was represented by counsel, waived the reading of the indictment and pleaded "no guilty" to the charges alleged in the indictment.

V.

That petitioner was tried before the trial Court and a jury on said indictment in said cause number 24629, the said trial commencing on April 19, 1938, and concluding on April 29, 1938, by a verdict of "guilty" on all counts of the indictment.

VI.

That thereafter and on May 14, 1938, the trial Court rendered judgment against the petitioner and sentenced him to imprisonment in a penitentiary to be designated by the Attorney General for a term of sixty-five years.

VII.

That petitioner at the time of his arraignment and at all times thereafter and during the course of his trial before the trial Court knew and understood the nature of the charges contained in the indictment against him.

VIII.

That the petitioner at the time of his arraignment and at all times throughout the trial of his case and at the time of his judgment and sentence was represented by counsel and had the effective assistance of counsel for his defense.

IX.

That the petitioner is a confirmed criminal, and prior to his sentence by the trial Court had a long record of previous felony convictions.

X.

That the petitioner was not denied the right of compulsory process of witnesses essential to his defense.

XI.

That there was no conflict in interest between the petitioner and his co-defendant, John Simunov.

XII.

That the Government, or any of its agents, did not knowingly, or at all, employ false testimony during

the trial of the petitioner to obtain the conviction of the said petitioner.

XIII.

That the petitioner has not sustained the burden of proving that the Government, or any of its agents, knowingly, or at all, employed false testimony during the trial of the petitioner to obtain the conviction of the said petitioner.

XIV.

That neither the trial judge nor the United States Attorney, nor any of his assistants, nor any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him in the trial Court.

XV.

That the petitioner has not sustained the burden of proving that the trial judge or the United States Attorney, or any of his assistants, or any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgments of conviction heretofore entered against him in the trial Court.

XVI.

That at all times in the proceedings before the trial Court, the trial Court had jurisdiction over the person of petitioner and of the offenses alleged in the respective counts of the indictment.

XVII.

That the petitioner was accorded a fair trial before the trial Court.

XVIII.

That the petitioner failed to sustain the burden of proving that he was denied a fair trial before the trial Court.

XIX

That this is the fourth Petition for Writ of Habeas Corpus filed by petitioner herein, all of them—a prior petition in case number 23268-W, a prior petition in case number 23721-R, and a prior petition in case number 25040-S—having been denied by this Court; that the first petition was filed in June 1940; that the second petition was filed in September 1942; that the third petition was filed in August 1945; that on appeal from the first refusal of this Court to discharge petitioner from custody, the judgment was affirmed by the United States Court of Appeals for the Ninth Circuit, in *Price v. Johnston*, 125 Fed. (2d) 806, certiorari denied, 316 U.S. 677; that a like result was reached on appeal in the second proceeding, in *Price v. Johnston*, 144 Fed. (2d) 260; that no appeal was taken from the denial of the third petition.

XX.

That the facts leading up to the issuance of the writ herein are found in the opinion of the Supreme Court of the United States, in the case of *Price v. Johnston*, number 111, October term 1947, decided May 24, 1948, 334 U.S. 266; that the issue with which

the Supreme Court was concerned in its opinion was an allegation by the petitioner that the Government had knowingly used false testimony to obtain the conviction of the petitioner; that after the remand by the Supreme Court and the issuance of the writ, the petitioner was permitted to amend his petition to include an allegation that he had been denied his right of appeal from the judgment of conviction entered before the trial Court; that the other findings of fact heretofore set forth were developed by testimony, oral or documentary, during the course of the hearing on the writ; that during the pendency of the instant proceedings, James A. Johnston retired as Warden of the United States Penitentiary at Alcatraz, California, to be succeeded by E. B. Swope, who was then, pursuant to stipulation of parties, substituted as party respondent in the place and in the stead of the aforesaid James A. Johnston.

CONCLUSIONS OF LAW.

I.

That petitioner at the time of his arraignment and at all times thereafter and during the course of his trial before the trial Court knew and understood the nature of the charges contained in the indictment against him.

II.

That the petitioner at the time of his arraignment and at all times throughout the trial of his case and at the time of his judgment and sentence was repre-

sented by counsel and had the effective assistance of counsel for his defense.

III.

That the petitioner was not denied the right of compulsory process of witnesses essential to his defense.

IV.

That there was no conflict in interest between the petitioner and his co-defendant, John Simunov.

V.

That the Government, or any of its agents, did not knowingly, or at all, employ false testimony during the trial of the petitioner to obtain the conviction of the said petitioner.

VI.

That the petitioner has not sustained the burden of proving that the Government, or any of its agents, knowingly, or at all, employed false testimony during the trial of the petitioner to obtain the conviction of the said petitioner.

VII.

That neither the trial judge nor the United States Attorney, nor any of his assistants, nor any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him in the trial Court.

VIII.

That the petitioner has not sustained the burden of proving that the trial judge or the United States Attorney, or any of his assistants, or any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him in the trial Court.

IX.

That at all times in the proceedings before the trial Court, the trial Court had jurisdiction over the person of petitioner and of the offenses alleged in the respective counts of the indictment.

X.

That petitioner was not denied due process of law before the trial Court.

XI.

That the petitioner has not sustained the burden of proving he was denied due process of law before the trial Court.

XII.

That the petitioner was not denied any of his constitutional rights before the trial Court.

XIII.

That the petitioner failed to sustain the burden of proving that he was denied any of his constitutional rights before the trial Court.

XIV.

That the petitioner was accorded a fair trial before the trial Court.

XV.

That the petitioner failed to sustain the burden of proving that he was denied a fair trial before the trial Court.

XVI.

That the sentence which petitioner is now serving is a valid judgment presently in full force and effect.

XVII.

That there is no merit to the petition for writ of habeas corpus on file herein.

XVIII.

That petitioner is now in the lawful custody and control of the respondent and is not now entitled to his discharge from the United States Penitentiary at Alcatraz, California.

Dated, San Francisco, California,

March 9, 1949.

Michael J. Roche,
Judge of the District Court."

